Goh Leong Yong v ASP Khairul Fairoz bin Rodzuan & Ors

FEDERAL COURT (PUTRAJAYA) — CRIMINAL APPEAL NO 05(HC)-158–11 OF 2020 (W)
VERNON ONG, ABDUL RAHMAN SEBLI AND ZABARIAH YUSOF FCJJ
30 JULY 2021

Constitutional Law — Fundamental liberties — Habeas corpus — Magistrate ordered person arrested under Prevention of Crime Act 1959 ('the POCA') to be remanded for 21 days under s 4(1)(a) of the POCA — Detainee applied for writ of habeas corpus for release from remand — By the time habeas corpus application came up for hearing, initial remand order had been replaced by second 38-day remand order under s 4(2)(a) of the POCA — Whether habeas corpus application was rendered academic as a result — Whether first remand order that application sought to challenge was extinguished by the second remand order — Whether there was procedural non-compliance that rendered the detention unlawful — Whether guidelines that Federal Court had laid down for magistrates to follow when dealing with remand applications under s 4 of the POCA were per incuriam as magistrates were only required to follow the statutory requirements of POCA and nothing more — Whether s 4 of the POCA was constitutional as Federal Constitution had empowered Parliament to prescribe fixed periods of remand under POCA which magistrates had to follow — Whether refusal of smaller bench of Federal Court to follow previous decision of larger bench of the court rendered smaller bench's decision per incuriam — Whether what mattered was correctness of the decision and not the size of the bench

Following the appellant's two arrests on suspicion of having committed an offence under the Common Gaming Houses Act 1953, he was re-arrested under s 3(1) of the Prevention of Crime Act 1959 ('the POCA') and ordered by the second respondent to be remanded for a 21-day period from 31 October 2020 until 20 November 2020 ('the first remand order') pursuant to s 4(1)(a) of the POCA. On 3 November 2020, the appellant applied to the High Court for a writ of habeas corpus to release him from his detention. The application was fixed for hearing on 16 November 2020. However, on 13 November 2020, the first and third respondents obtained from the second respondent a second remand order, pursuant to s 4(2)(a) of the POCA, to remand the appellant for a period of 38 days from 13 November 2020 ('the second remand order'). When the habeas corpus application came up for hearing on 16 November 2020, the respondents raised the preliminary objection ('PO') that the application had been rendered academic and should be dismissed since the first remand order — which was the subject-matter of the application — had ceased to exist. The High Court agreed with the PO and dismissed the habeas corpus

application. In the instant appeal against the decision, the appellant raised several issues for determination including: (a) whether the habeas corpus application was rendered academic by the second remand order ('the academic point'); (b) whether s 4 of the POCA was unconstitutional; (c) whether there were mala fides in the appellant's detention; (d) whether the Minister had acted ultra vires POCA by including 'unlawful gaming' in Item 5 of its First Schedule. It was suggested that unlawful gaming could not be regarded as a crime of 'organised violence against persons or property' that threatened peace, tranquility and public order which was what POCA was enacted to deal with; (e) whether the statement of facts delivered by the respondents under s 4(1)(a) of the POCA did not bring the appellant's case within the recitals of the POCA; (f) whether there was procedural non-compliance that rendered the appellant's detention under s 4(1)(a) unlawful; and (g) whether, in issuing the remand order, the second respondent had complied with the guidelines for magistrates dealing with applications for remand under s 4 of the POCA that were laid down by the Federal Court in *Zaidi bin Kanapiah v ASP Khairul Fairoz bin Rodzuan and other cases* [2021] 3 MLJ 759 ('Zaidi bin Kanapiah') where the issues raised were the same as the ones raised in the instant appeal. Since a majority of the five-member panel in Zaidi bin Kanapiah had found that the habeas corpus application in that case was not rendered academic as a result of a second remand order superseding the one that was under challenge, the appellant herein argued that the instant smaller panel should follow *Zaidi bin Kanapiah* on the academic point as a failure to do so might render its decision per incuriam. *Zaidi bin Kanapiah* had held, by a majority, that s 4 of the POCA was not unconstitutional.

Held, by majority, dismissing the appeal:

(1) **(per Vernon Ong FCJ, dissenting)** The factual matrix and the legal issues that obtained in this appeal and in *Zaidi bin Kanapiah* were similar and the issues raised here were already adjudicated upon and decided in that case. This court in *Zaidi bin Kanapiah* held that s 4 of POCA was not unconstitutional; that the fact of a supervening detention or remand did not render the habeas corpus application academic; that the court was required in law to enquire into the lawfulness of the detention or remand which formed the subject-matter of the habeas corpus application. The same could be said for the remaining issues on mala fides and abuse of power. It was crucial to note that in this appeal, as in *Zaidi bin Kanapiah*, it was not an administrative or ministerial detention order that was under challenge, but a remand order made by a magistrate, a judicial officer acting in a judicial capacity at the hearing of a remand application (see paras 7–9).

(2) **(per Vernon Ong FCJ, dissenting)** In a habeas corpus hearing, the burden was on the respondents to show that the detention was lawful in that all legal, procedural and constitutional safeguards had been

complied with. This court in *Zaidi bin Kanapiah* had issued writs of habeas corpus on the ground that the respondents had failed to show that the magistrate had exercised her discretion judicially to ensure that all legal, procedural and constitutional safeguards had been complied with. I was a member of the panel in *Zaidi bin Kanapiah* and I am not inclined to adopt a different position here. The law on the issues as laid down by this court in *Zaidi bin Kanapiah* was settled. I therefore agree with the submissions of counsel for the appellant and allow the appeal (see paras 7–9).

(3) **(per Abdul Rahman Sebli FCJ, concurring)** The fact that the majority of the instant panel of three judges of this court departed from the majority decision of the larger bench of five judges in *Zaidi bin Kanapiah* to hold that the instant appeal was academic, did not render this court's majority decision on the academic point per incuriam. It was never the law in Malaysia that a smaller bench of the apex court could not depart from the decision of a larger bench of the court. It was the correctness of the decision that mattered and not the size of the bench. The submission that the decision of a smaller bench in not following the decision of a larger bench in a previous case was per incuriam was off-tangent and was not supported by the established cases on the per incuriam rule. The authorities held that per incuriam was a decision that failed to apply a relevant statutory provision or ignored a binding precedent. As was held by the minority in *Zaidi bin Kanapiah*, there was no difference in law between a judgment delivered by a smaller bench and one delivered by a larger bench; and if a smaller bench in one case refused to follow the decision of a larger bench in a previous case on the same point of law, the correctness of the decision of the smaller bench ought to be subjected to greater scrutiny by a subsequent panel of the court. What that meant was that it was the correctness of the decision that counted and not the size of the bench (see paras 28–31, 44–49 & 71).

(4) **(per Abdul Rahman Sebli FCJ, concurring)** On the academic point, this court's decision in *Mohamed Ezam bin Mohd Nor & Ors v Ketua Polis Negara* [2002] 1 MLJ 321 must stand overruled while the decisions of this court in *Mohd Faizal bin Haris v Timbalan Menteri Dalam Negeri Malaysia & Ors* [2006] 1 MLJ 309 and *Kerajaan Malaysia & Ors v Nasharuddin Nasir* [2003] MLJU 841 and all other cases decided along the same line were re-affirmed (see para 72).

(5) **(per Zabariah Yusof FCJ, majority)** The appellant's challenge to his detention under s 4(1)(a) of the POCA had become academic as his detention under that section had come to an end by the time his habeas corpus application came up for hearing before the High Court. An application for a writ of habeas corpus had to be directed towards the current detention order. In addition, there was no procedural

non-compliance of any statutory requirements in the detention of the appellant under s 4(1)(a) (see paras 122 & 201).

(6) **(per Zabariah Yusof FCJ, majority)** The proposition that the legality of a detention or detentions must be viewed as a single overarching transaction could not be accepted. It was misconceived to say that the detaining authority relied on subsequent detentions to circumvent the illegality of the initial remand or detention under challenge at the time the application for habeas corpus was filed. In an application for a writ of habeas corpus, the remedy was the release of the detainee from the detaining authority. If it was proven that the detention was unlawful because of procedural non-compliance of conditions precedent of the relevant statute, a release of the detenu was inevitable. But there might be more than one detention order issued by different authorities for different periods of time, not to mention the different provisions of the statute under which the detention order was issued in which different considerations of condition precedent might apply. Therefore, it was pertinent for the appellant to properly direct his challenge to the current detention order (see para 111).

(7) **(per Zabariah Yusof FCJ, majority)** The appellant's detention under both s 4(1)(a) and 4(2)(a) of the POCA were lawful as there was no procedural non-compliance with the requirements of either of those sections in the issuance of the remand orders against the appellant. The courts had to refer to the relevant statutory provisions of POCA that lay down the procedural requirements in determining whether a detention under s 4 of the POCA was lawful. It was not for the courts to create procedural requirements as it was not the courts' function to make law/rules. If there was no procedural non-compliance, the detention could not be unlawful (see paras 125 & 139).

(8) **(per Zabariah Yusof FCJ, majority)** The procedures that were prescribed in *Zaidi bin Kanapiah* for magistrates when dealing with remand applications under s 4 of POCA were per incuriam and were merely guidelines that could not override and replace the statutory requirements mandated under that section. Hence, in determining whether a 21-day remand order under s 4(1)(a) of the POCA was valid or not depended on whether the statutory requirements of that section had been complied with — nothing more and nothing less. Therefore, for example, matters such as the validity of the prior arrest of the detainee or whether the police diary disclosed sufficient information to support an arresting officer's belief that there were grounds to hold an inquiry into the case of the person arrested were of no consequence because they were not the procedural requirements for the 21-day remand to be given. The remand procedure under the Criminal Procedure Code (for the purpose of carrying out investigations with a view to charging the detainee) was

not applicable to the remand procedure under POCA since the latter was a special law where the remand was with a view to making a preventive detention order (see paras 196–200).

(9) **(per Zabariah Yusof FCJ, majority)** Section 4 of the POCA was not unconstitutional. It did not breach art 121 of the Federal Constitution ('the FC'). Article 74 of the FC empowered Parliament to legislate on the jurisdiction and powers of the courts while art 149 empowered Parliament to enact POCA and to, inter alia, prescribe the 21-day remand period under s 4(1)(a) thereof. The courts derived their powers from federal law (art 121) and POCA was one of them. By prescribing the 21-day remand period under s 4(1)(a), Parliament did not encroach into the power of the court as it was within Parliament's power to make such law. Parliament's power was conferred by the FC, which was the supreme law of the Federation (see paras 169 & 202).

(10) **(per Zabariah Yusof FCJ, majority)** Paragraph 5 of Part I of the First Schedule to POCA had been in existence since the promulgation of POCA in 1959. It was Parliament's intention since then to include unlawful gaming as one of the categories under POCA. Given the obvious nexus between unlawful gaming/gambling and organised crime, the argument that the inclusion of unlawful gaming in the First Schedule was unconstitutional had no merit. The activities of the appellant in unlawful gambling would lead to social problems and criminal activities and was indeed a threat to public order. The statement of facts produced by the first respondent before the magistrate to obtain the remand order against the appellant under s 4(1)(a) was therefore within the scope of para 5 of Part I of the First Schedule to POCA (see paras 175, 177–178, 181 & 183).

(11) **(per Zabariah Yusof FCJ, majority)** The appellant had failed to show that his detention was tainted with mala fides. In any event, the only acceptable ground to challenge the propriety of a detention was procedural non-compliance of the requirements as set out in the Act pursuant to which a detainee was detained. The authorities were clear that a detainee's allegation that his arrest was mala fide did not amount to procedural non-compliance. It was not shown that there was procedural non-compliance in the detention of the appellant (see paras 189, 191 & 193).

[Bahasa Malaysia summary

Lanjutan dua tangkapan perayu kerana disyaki melakukan kesalahan di bawah Akta Rumah Judi Terbuka 1953, beliau telah ditangkap semula di bawah s 3(1) Akta Pencegahan Jenayah 1959 ('APJ') dan diperintahkan oleh responden kedua supaya direman selama 21 hari dari 31 Oktober 2020 hingga 20 November 2020 ('perintah reman pertama') menurut s 4(1)(a) APJ. Pada 3

November 2020, perayu memohon kepada Mahkamah Tinggi untuk mendapatkan perintah habeas corpus bagi membebaskannya dari tahanan. Permohonan tersebut ditetapkan untuk pendengaran pada 16 November 2020. Walau bagaimanapun, pada 13 November 2020, responden pertama dan ketiga memperoleh perintah reman kedua dari responden kedua, menurut s 4(2)(a) APJ, untuk mereman pemohon bagi tempoh 38 hari dari 13 November 2020 ('perintah reman kedua'). Apabila permohonan habeas corpus akan didengar pada 16 November 2020, responden mengemukakan bantahan awal ('PO') bahawa permohonan tersebut telah menjadi akademik dan harus ditolak oleh kerana perintah reman pertama — yang merupakan perkara utama permohonan — sudah tidak wujud lagi. Mahkamah Tinggi bersetuju dengan PO dan menolak permohonan habeas corpus tersebut. Dalam rayuan semasa terhadap keputusan tersebut, perayu membangkitkan beberapa isu untuk ditentukan termasuklah: (a) sama ada permohonan habeas corpus telah menjadi akademik oleh perintah reman kedua ('titik akademik'); (b) sama ada s 4 APJ adalah tidak berperlembagaan; (c) sama ada terdapat mala fide dalam penahanan perayu; (d) sama ada Menteri telah bertindak secara ultra vires APJ dengan memasukkan 'judi haram' dalam perkara 5 Jadual Pertama. Ianya telah dinyatakan bahawa judi haram tidak boleh dianggap sebagai jenayah 'keganasan terancang terhadap seseorang atau harta benda' yang mengancam keamanan, ketenangan dan ketenteraman awam yang mana APJ digubal untuk menanganinya; (e) sama ada penyataan fakta yang disampaikan oleh responden di bawah s 4(1)(a) APJ tidak membawa kes perayu dalam resital APJ; (f) sama ada terdapat ketidakpatuhan prosedur yang menjadikan penahanan perayu di bawah s 4(1)(a) tidak sah; dan (g) sama ada, dalam mengeluarkan perintah reman tersebut, responden kedua telah mematuhi garis panduan untuk majistret yang menentukan permohonan reman di bawah s 4 APJ yang ditetapkan oleh Mahkamah Persekutuan dalam *Zaidi bin Kanapiah v ASP Khairul Fairoz bin Rodzuan and other cases* [2021] 3 MLJ 759 ('Zaidi bin Kanapiah') di mana isu-isu yang dibangkitkan adalah sama dengan yang dibangkitkan dalam rayuan semasa. Oleh kerana majoriti panel lima anggota dalam *Zaidi bin Kanapiah* telah mendapati bahawa permohonan habeas corpus dalam kes tersebut tidak menjadi akademik disebabkan oleh perintah reman kedua yang menggantikan perintah yang dibantah, perayu di sini berpendapat bahawa panel semasa harus mengikuti *Zaidi bin Kanapiah* dari sudut akademik kerana kegagalan untuk melakukannya dapat menyebabkan keputusan sebagai per incuriam. *Zaidi bin Kanapiah* telah memutuskan, dengan majoriti, bahawa s 4 APJ adalah tidak berperlembagaan.

Diputuskan, melalui majoriti, menolak rayuan:

(1) **(oleh Vernon Ong HMP, menentang)** Matriks faktual dan isu perundangan yang diperoleh dalam rayuan ini dan dalam *Zaidi bin Kanapiah* adalah serupa dan isu-isu yang dibangkitkan di sini telah

diadili dan diputuskan dalam kes tersebut. Mahkamah dalam *Zaidi bin Kanapiah* memutuskan bahawa s 4 APJ adalah tidak berperlembagaan; bahawa hakikat penahanan atau reman yang tinggi tidak menjadikan permohonan habeas corpus menjadi akademik; bahawa mahkamah diharuskan berdasarkan perundangan untuk meneliti kesahihan penahanan atau reman menjadi perkara utama permohonan habeas corpus. Perkara yang sama dapat dikatakan untuk isu lain mengenai mala fide dan penyalahgunaan kuasa. Ianya adalah penting untuk diperhatikan bahawa dalam rayuan ini, seperti dalam *Zaidi bin Kanapiah*, ianya bukan perintah penahanan pentadbiran atau kementerian yang dibantah tetapi perintah penahanan reman yang dibuat oleh majistret, seorang pegawai kehakiman yang bertindak dalam kapasiti kehakiman semasa pendengaran permohonan reman (lihat perenggan 7–9).

(2) **(oleh Vernon Ong HMP, menentang)** Dalam pendengaran habeas corpus, beban pada responden menunjukkan bahawa penahanan tersebut adalah sah di mana kesemua perlindungan undang-undang, prosedur dan perlembagaan telah dipatuhi. Mahkamah dalam *Zaidi bin Kanapiah* ini telah mengeluarkan writ habeas corpus dengan alasan bahawa responden telah gagal menunjukkan bahawa majistret telah menggunakan budi bicaranya secara adil untuk memastikan bahawa kesemua perlindungan undang-undang, prosedur dan perlembagaan telah dipatuhi. Saya adalah ahli panel dalam *Zaidi bin Kanapiah* dan saya tidak cenderung untuk mengambil kedudukan yang berbeza di sini. Undang-undang pada isu-isu seperti yang ditetapkan oleh mahkamah ini dalam *Zaidi bin Kanapiah* telah diputuskan. Oleh itu, mahkamah bersetuju dengan penghujahan peguamcara bagi perayu dan membenarkan rayuan (lihat perenggan 7–9).

(3) **(oleh Abdul Rahman Sebli HMP, bersetuju)** Fakta bahawa majoriti panel tiga hakim semasa mahkamah ini meninggalkan keputusan majoriti lima hakim dalam *Zaidi bin Kanapiah* untuk memutuskan bahawa rayuan semasa adalah bersifat akademik, tidak menyebabkan keputusan majoriti mahkamah ini pada titik akademik per incuriam. Ia tidak pernah menjadi undang-undang di Malaysia bahawa panel yang lebih kecil mahkamah agung tidak dapat meninggalkan keputusan panel yang lebih besar mahkamah tersebut. Ia adalah berdasarkan keputusan yang betul dan bukan ukuran panel hakim. Penghujahan bahawa keputusan penal yang lebih kecil dalam tidak mengikuti keputusan panel yang lebih besar dalam kes sebelumnya adalah per incuriam adalah tidak wajar dan tidak disokong oleh kes-kes terdahulu terhadap peraturan per incuriam. Pihak berkuasa berpendapat bahawa per incuriam adalah keputusan yang gagal menerapkan peruntukan undang-undang yang wajar atau mengabaikan duluan yang mengikat. Seperti yang diputuskan oleh minoriti di *Zaidi bin Kanapiah*, tidak ada perbezaan dalam

undang-undang antara penghakiman yang disampaikan oleh panel yang lebih kecil dan yang dikeluarkan oleh panel yang lebih besar; dan sekiranya panel yang lebih kecil dalam satu kes menolak untuk mengikuti keputusan panel yang lebih besar dalam kes terdahulu pada titik perundangan yang sama, ketepatan keputusan panel yang lebih kecil harus diteliti dengan tepat oleh panel mahkamah berikutnya. Apa yang dimaksudkan adalah keputusan yang tepat adalah penting dan bukannya ukuran panel (lihat perenggan 28–31, 44–49 & 71).

(4) **(oleh Abdul Rahman Sebli HMP, bersetuju)** Dari sudut akademik, keputusan mahkamah ini dalam *Mohamed Ezam bin Mohd Nor & Ors v Ketua Polis Negara* [2002] 1 MLJ 321 mesti ditolak sementara keputusan mahkamah ini dalam keputusan *Mohd Faizal bin Haris v Timbalan Menteri Dalam Negeri Malaysia & Ors* [2006] 1 MLJ 309 and *Kerajaan Malaysia & Ors v Nasharuddin Nasir* [2003] MLJU 841 dan semua kes lain yang diputuskan mengikut garis yang sama harus dikekalkan semula (lihat perenggan 72).

(5) **(oleh Zabariah Yusof HMP, majoriti)** Bantahan perayu terhadap penahanannya di bawah s 4(1)(a) APJ menjadi akademik kerana penahanannya di bawah seksyen tersebut telah berakhir apabila permohonan habeas corpusnya didengar di Mahkamah Tinggi. Permohonan untuk writ habeas corpus harus ditujukan kepada perintah penahanan semasa. Selain itu, tidak ada ketidakpatuhan prosedur dalam sebarang ketetapan perundangan dalam penahanan perayu di bawah s 4(1)(a) (lihat perenggan 122 & 201).

(6) **(oleh Zabariah Yusof HMP, majoriti)** Penghujahan bahawa kesahan penahanan atau penahanan-penahan tersebut harus dilihat sebagai satu transaksi menyeluruh tidak seharusnya diterima. Ianya adalah suatu salah arah untuk mengatakan bahawa pihak berkuasa yang menahan telah bergantung pada penahanan berikutnya untuk menghindari pelanggaran hak reman awal atau penahanan yang dibantah semasa permohonan habeas corpus difailkan. Dalam permohonan writ habeas corpus, remedi adalah pembebasan tahanan dari pihak berkuasa yang menahan. Sekiranya terbukti bahawa penahanan tersebut adalah tidak sah kerana ketidakpatuhan syarat-syarat yang terdahulu undang-undang wajar, pembebasan tahanan tidak dapat dielakkan. Tetapi mungkin terdapat lebih dari satu perintah penahanan yang dikeluarkan oleh pihak berkuasa yang berlainan untuk jangka masa yang berlainan, juga peruntukan undang-undang yang berlainan di mana perintah penahanan dikeluarkan di mana pertimbangan syarat-syarat yang terdahulu mungkin terpakai. Oleh itu, adalah amat penting bagi perayu untuk mengarahkan bantahannya dengan tepat terhadap perintah penahanan semasa (lihat perenggan 111).

(7) **(oleh Zabariah Yusof HMP, majoriti)** Penahanan perayu di bawah

kedua-dua s 4(1)(a) dan 4(2)(a) APJ adalah sah kerana tidak ada ketidakpatuhan prosedur dengan ketetapan salah satu daripada seksyen tersebut dalam pengeluaran perintah reman terhadap perayu. Mahkamah harus merujuk kepada peruntukan undang-undang APJ yang relevan yang menetapkan syarat prosedur dalam menentukan sama ada penahanan di bawah s 4 APJ adalah sah. Ia bukan untuk mahkamah membuat ketetapan prosedur dan ianya bukan fungsi mahkamah untuk membuat undang-undang/peraturan. Sekiranya tidak ada ketidakpatuhan prosedur, penahanan tidak boleh menjadi tidak sah (lihat perenggan 125 & 139).

(8) **(oleh Zabariah Yusof HMP, majoriti)** Prosedur yang ditetapkan dalam *Zaidi bin Kanapiah* untuk majistret apabila berurusan dengan permohonan reman di bawah s 4 APJ adalah per incuriam dan hanyalah merupakan garis panduan yang tidak dapat mengatasi dan menggantikan syarat-syarat perundangan yang diperuntukkan di bawah seksyen tersebut. Oleh itu, dalam menentukan sama ada perintah reman 21 hari di bawah s 4(1)(a) APJ adalah sah atau tidak bergantung kepada sama ada syarat perundangan seksyen tersebut telah dipatuhi — tidak lebih dan tidak kurang. Oleh itu, sebagai contoh, perkara-perkara seperti kesahihan penahanan sebelumnya tahanan atau sama ada buku harian polis mendedahkan maklumat yang mencukupi untuk menyokong kepercayaan pegawai yang menahan bahawa terdapat alasan untuk mengadakan siasatan terhadap kes orang yang ditahan tanpa kesan kerana ianya bukan keperluan prosedur untuk tahanan reman 21 hari diberikan. Prosedur reman berdasarkan Kanun Tatacara Jenayah (untuk tujuan melakukan penyiasatan dengan tujuan untuk menuduh tahanan) tidak terpakai bagi prosedur penahanan reman di bawah APJ kerana ia adalah undang-undang khusus di mana penahan tersebut adalah dengan tujuan untuk membuat perintah penahanan pencegahan (lihat perenggan 196–200).

(9) **(oleh Zabariah Yusof HMP, majoriti)** Seksyen 4 APJ adalah tidak berperlembagaan. Ia tidak melanggar perkara 121 Perlembagaan Persekutuan ('PP'). Perkara 74 PP memberikan kuasa kepada Parlimen untuk menggubal perundangan mengenai bidang kuasa dan kuasa Mahkamah sementara perkara 149 memberikan kuasa kepada Parlimen untuk menggubal APJ dan, antara lain, menetapkan tempoh reman 21 hari di bawah s 4(1)(a). Mahkamah memperoleh kuasanya dari undang-undang persekutuan (perkara 121) dan APJ adalah salah satu darinya. Dengan menetapkan tempoh reman 21 hari di bawah s 4(1)(a), Parlimen tidak mengganggu kuasa mahkamah kerana ia adalah dalam kuasa Parlimen untuk membuat undang-undang tersebut. Kuasa Parlimen diberikan oleh PP, yang merupakan undang-undang teragung Persekutuan (lihat perenggan 169 & 202).

(10) **(oleh Zabariah Yusof HMP, majoriti)** Perenggan 5 Bahagian I Jadual Pertama APJ telah wujud semenjak penggubalan APJ pada tahun 1959. Ianya adalah niat Parlimen sejak itu untuk memasukkan judi haram sebagai salah satu kategori di bawah APJ. Oleh kerana hubungan yang jelas antara permainan/perjudian yang tidak sah dan jenayah terancang, hujahan bahawa kemasukan judi haram dalam Jadual Pertama adalah tidak berperlembagaan adalah tidak bermerit. Kegiatan perayu dalam perjudian haram akan menimbulkan masalah sosial dan kegiatan jenayah dan sememangnya mengancam ketenteraman awam. Penyataan fakta yang dikeluarkan oleh responden pertama di hadapan majistret untuk mendapatkan perintah tahanan reman terhadap perayu di bawah s 4(1)(a) oleh itu berada dalam ruang lingkup perenggan 5 Bahagian I Jadual Pertama APJ (lihat perenggan 175, 177–178, 181 & 183).

(11) **(oleh Zabariah Yusof HMP, majoriti)** Perayu gagal menunjukkan bahawa penahanannya dicemari dengan mala fide. Walau bagaimanapun, satu-satunya alasan yang dapat diterima untuk membantah hak penahanan adalah ketidakpatuhan prosedur syarat-syarat seperti yang dinyatakan dalam Akta yang mana seseorang tahanan ditahan. Pihak berkuasa adalah jelas bahawa tuduhan seorang tahanan bahawa penangkapannya adalah mala fide tidak membawa kepada ketidakpatuhan prosedur. Ia tidak ditunjukkan bahawa terdapat ketidakpatuhan prosedur dalam penahanan perayu (lihat perenggan 189, 191 & 193).]

Cases referred to

AR Antulay v RS Nayak and another 1988 AIR 1531; [1988] 1 MLJ (Crl) 501, SC (refd)

Abdul Razak bin Baharudin & Ors v Ketua Polis Negara & Ors and another appeal [2006] 1 MLJ 320; [2005] 4 CLJ 445, FC (refd)

Ahmad Saidi bin Md Isa v Timbalan Menteri Hal Ehwal & Ors [2006] 3 MLJ 208; [2006] 1 CLJ 977, CA (refd)

Alma Nudo Atenza v PP and another appeal [2019] 4 MLJ 1; [2019] 5 CLJ 780; [2019] 3 MLRA 1, FC (refd)

Anderton v Ryan [1985] 2 All ER 355, HL (refd)

Application of Tan Boon Liat @ Allen, Re; Tan Boon Liat v Menteri Hal Ehwal Dalam Negeri, Malaysia & Ors [1976] 2 MLJ 83; [1976] 1 LNS 126 (refd)

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Sivarasa Rasiah v Badan Peguam Malaysia & Anor [2010] 2 MLJ 333; [2010] 3 CLJ 507, FC (refd)
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Legislation referred to

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Companies Act 1965
Courts of Judicature Act 1964

Criminal Procedure Code ss 28A, 365, 366
Dangerous Drugs (Special Preventive Measures) Act 1985 ss 3, 3(2)(a), (2)(b), (2)(c), 5, 6, 6(1)
Dangerous Drugs Act 1952 s 39(2)
Emergency (Public Order and Prevention of Crime) Ordinance 1969 ss 3(1), 4(1), 7C(1), 7D(c)
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Internal Security Act 1960 ss 8, 8(1), 16, 57(1), 73, 73(1), (1)(a), (1)(b)
Interpretation Acts 1948 and 1967 s 35
Legal Profession Act 1976 s 46A(1)
Preventive of Crime Act 1959 ss 3, 3(1), 4, 4(1), (1)(a), (2)(a), (2)(a)(i), (2)(a)(ii), 9, 22, First Schedule, Part 1, item 5

Appeal from: Criminal Application No WA-44–216–11 of 2020 (High Court, Kuala Lumpur)

Gopal Sri Ram (Gobind Singh Deo, Jacky Loi Yap Loong, Yasmeen Soh Sha-Nisse, Peter Siew, Jin Wen, Maneesha Kaur and Manvir Singh with him) (TY Teh & Partners) for the appellant.
Farah Ezlin Yusop Khan (Muhammad bin Sinti and Nur Jihan bt Mohd Azman with her) (Senior Federal Counsel, Attorney General's Chambers) for the respondent.

Vernon Ong FCJ (delivering dissenting judgment of the court):

[1] The hearing of this appeal was originally scheduled on 26 April 2021. It was adjourned at the request of appellant counsel pending the decision of this court in *Zaidi bin Kanapiah v ASP Khairul Fairoz bin Rodzuan and other cases* [2021] 3 MLJ 759; [2021] 5 CLJ 581. The application for adjournment was made on the ground that the issues raised in the High Court are identical to the issues raised in *Zaidi bin Kanapiah*. *Zaidi bin Kanapiah* was heard in December 2020 and the decision was delivered on 27 April 2021.

[2] At the hearing of this appeal, learned counsel for the appellant Datuk Seri Gopal Sri Ram addressed the court on two main points — (i) the academic issue; and (ii) the non-compliance with the guidelines laid down by this court in *Zaidi bin Kanapiah*.

[3] Learned counsel argued that the academic issue also came up in *Zaidi bin Kanapiah* where three Justices concurred with the Chief Justice on this point; whilst Justice Hasnah's stand on this point was not unequivocal, Justice Hasnah nevertheless opined that in the interest of justice the appellant should be heard on the legality of the remand order issued against the appellants.

[4] Learned counsel's argument on the second issue was succinct and direct to the point. It is this: the magistrate granting the s 4(1) remand order did not exercise her discretion judicially to ensure that all the legal, procedural, and constitutional safeguards have been complied with before making the remand order. In particular, learned counsel argued that the respondents failed to discharge their burden of showing that the magistrate did in fact exercise her discretion judicially at the hearing of the remand application under s 4(1) of the POCA. As such, the magistrate failed to adhere to the guidelines laid down by this court in *Zaidi bin Kanapiah*.

[5] Apart from these two main points, there were three other points raised in the appellant's written submissions, to wit: (i) constitutionality of s 4 of the POCA; (ii) mala fides; and (iii) abuse of power.

[6] In reply, learned senior federal counsel for the respondents submitted that: (i) the guidelines in *Zaidi bin Kanapiah* are per incuriam; (ii) the guidelines impose an additional burden with repercussions on the respondents; and (iii) ss 3 and 4 of the POCA was sufficient to provide the magistrate with judicial power. Secondly, it was also argued that the guidelines should only have prospective effect. There are many cases involving many detainees and if the guidelines were not prospective, there would result in fresh applications for habeas corpus and the magistrate would be made a respondent to these proceedings. Thirdly, SFC argued that the magistrate cannot be named as a respondent in a habeas corpus proceeding as it might affect his impartiality.

DECISION

[7] The factual matrix and the legal issues that obtain in this appeal and that in *Zaidi bin Kanapiah* are similar. In a habeas corpus hearing, the burden is on the respondents to show the court that the detention is lawful in that it complies with all legal, procedural and constitutional safeguards. In this appeal, however, as in *Zaidi bin Kanapiah*, it is not a detention order that is challenged but a remand order made under s 4(1) of the POCA. It is a remand order made by a magistrate, a judicial officer acting in a judicial capacity at the hearing of a remand application. This is not a challenge against an administrative or ministerial detention order. This distinction is critical to note.

[8] The issues raised by the appellant in the written submission have already been adjudicated and decided by this court in *Zaidi bin Kanapiah*. This court held that s 4 of the POCA is not unconstitutional. That the fact of a supervening detention or remand does not render the habeas corpus application academic. That the court is required in law to enquire into the lawfulness of the detention or remand which forms the subject matter of the

habeas corpus application. The same can be said for the remaining two issues on mala fides and abuse of power.

[9] More pertinently, this court in *Zaidi bin Kanapiah* has issued writs of habeas corpus on the ground that the respondents failed to show that the magistrate had exercised her discretion judicially to ensure that all legal, procedural and constitutional safeguards have been complied with. I was a member of the panel in *Zaidi bin Kanapiah* and I am not inclined to adopt a different position. In my view, the law on the issues as laid down by this court in *Zaidi bin Kanapiah* is settled. I therefore agree with the submissions of learned counsel for the appellants Datuk Seri Gopal Sri Ram and Gobind Singh Deo. Accordingly, I would allow the appeal and issue a writ of habeas corpus.

Abdul Rahman Sebli FCJ (delivering concurring judgment of the court):

[10] I have read the judgment of my learned sister Justice Zabariah Mohd Yusof in draft and I agree with the reasoning and the decision reached. In support of the judgment, I shall touch first of all on a significant issue of law raised by Datuk Seri Gopal Sri Ram which I think needs elaboration in view of the frequency in which the issue had been raised of late. This relates in particular to para [10] of learned counsel's written submissions dated 2 April 2021 where he said this:

> 10. The majority in *Maria Chin Abdullah v Ketua Pengarah Imigresen & Anor* [2021] 1 MLJ 750; [2021] 2 CLJ 579 *[13A TAB 130]* and *Rovin Joty a/l Kodeeswaran v Lembaga Pencegahan Jenayah & Ors and other appeals* [2021] 2 MLJ 822; [2021] 4 CLJ 1; [2021] 3 MLRA 260 [13AB TAB 129] overlooked the principles laid down in *Semenyih Jaya*, *Indira Gandhi* and *Alma Nudo* and wrongly sought to limit itself to the peculiar facts of those cases. The court disobeyed judicial courtesy by departing from the decision of a bench of 9 Justices in *Alma Nudo* on the issue of separation of powers. See *Asia Pacific Higher Learning Sdn Bhd (registered owner and licensee of the higher learning institution Lincoln University College) v Majlis Perubatan Malaysia & Anor* [2020] 2 MLJ 1, *KS Puttaswamy v Union of India* (2015) 8 SCC 735 and *Siddharam Satlingappa Mhetre v State of Maharashtra* [2011] 1 SCC 694.

[11] Quite clearly the contention is that the majority decisions of this court in *Maria Chin Abdullah v Ketua Pengarah Imigresen & Anor* [2021] 1 MLJ 750; [2021] 2 CLJ 579 ('Maria Chin') and *Rovin Joty a/l Kodeeswaran v Lembaga Pencegahan Jenayah & Ors and other appeals* [2021] 2 MLJ 822; [2021] 4 CLJ 1; [2021] 3 MLRA 260 ('Rovin Joty') were given per incuriam, ie wrongly decided on the ground that they 'overlooked' the principles laid down in *Semenyih Jaya Sdn Bhd v Pentadbir Tanah Daerah Hulu Langat and another case* [2017] 3 MLJ 561; [2017] 4 MLRA 554; [2017] 5 CLJ 526 ('Semenyih Jaya'), *Indira Gandhi a/p Mutho v Pengarah Jabatan Agama*

Islam Perak & Ors and other appeals [2018] 1 MLJ 545; [2018] 2 MLRA 1; [2018] 3 CLJ 145 ('Indira Gandhi') and *Alma Nudo Atenza v Public Prosecutor and another appeal* [2019] 4 MLJ 1; [2019] 5 CLJ 780; [2019] 3 MLRA 1 ('Alma Nudo'), and for that reason the two cases are not to be treated as authorities on the issue of separation of powers which, according to counsel, is a basic structure of the Federal Constitution ('the Constitution') as propounded in *Semenyih Jaya*, *Indira Gandhi* and *Alma Nudo*.

[12] The premise of the argument is that any law that violates the basic structure doctrine violates the sanctity of the Constitution and is therefore null and void. In relation to the present case, the argument targets s 4 of the Prevention of Crime Act 1959 ('the POCA').

[13] The origin of the argument can be traced back to the amendment to art 121(1) of the Constitution which came into force on 10 June 1988. Learned counsel's contention is that the amendment is unconstitutional as it impinges on the doctrine of separation of powers by 'removing' judicial power from the two High Courts, no doubt inspired by the obiter dictum of Zainun Ali FCJ in *Semenyih Jaya* and *Indira Gandhi*. Learned counsel went so far as to argue that art 121(1) must be read as it stood before its amendment on 10 June 1988, where it provided that 'the judicial power of the Federation shall be vested in two High Courts of coordinate jurisdiction and status'.

[14] The pith and substance of counsel's argument is that Parliament has no power, not even by way of art 159 of the Constitution, to amend any 'basic structure' of the Constitution, in the present case to amend art 121(1) to remove the judicial power of the two High Courts. I understand the argument to mean that all basic structures of the Constitution, whatever they are and wherever they are to be found in the Constitution, must forever and for better or for worse remain untouched by Parliament and that in violation of that doctrine, Parliament has removed judicial power from the two High Courts by amending art 121(1) of the Constitution.

[15] In order to put right what he perceives to be a wrong done by Parliament, learned counsel has moved this court in para 8 of his written submissions to make an order that Act A704, which amended art 121(1) of the Constitution, be struck down as being unconstitutional and therefore null and void and of no effect. This is how the point was raised in the submissions:

> 8. Because judicial power cannot be removed from the judiciary by way of amendment of the Constitution, Act A704 which cut into the judicial power and reduced the judicial arm from an equal partner in Government to a subordinate of Parliament is violative of the basic structure of the Constitution and is therefore null and void and of no effect. The detenu respectfully moves for a finding to this effect and for an order that Act A704 be struck down. It is therefore submitted with

respect that the validity of section 4 must be tested against Article 121 as it stood before 10 June 1988. A

[16] If the application were to be allowed, the amendment to art 121(1) would be nullified and the language of the article would be reverted to its pre-amendment language, which is to stipulate in express terms that the judicial power of the Federation shall be vested in the two High Courts of coordinate jurisdiction and status. From the appellant's perspective, the application if allowed would be to render s 4 of the POCA null and void as it would then be in violation of the doctrine of separation of powers by taking away the discretionary power of the magistrate in granting the remand orders, which in turn would be a breach of the basic structure doctrine. B C

[17] I must say at once and with due respect to Datuk Seri Gopal Sri Ram that the application is frivolous and must be dismissed. In the first place, learned counsel has not explained how the removal of the words 'the judicial power of the Federation shall be vested in two High Courts of coordinate jurisdiction and status' from art 121(1) of the Constitution has the effect of removing or divesting judicial power from the two High Courts. To remove judicial power from the two High Courts means to take away judicial power from the two High Courts and leaving them with no judicial power to exercise. D E

[18] That cannot be factually correct. Judicial power has never been removed from the two High Courts and will remain vested in the two High Courts for as long as art 121(1) is still embedded in the Constitution. There is nothing in art 121(1) that can be construed as vesting judicial power on any other body other than the two High Courts and the inferior courts after the amendment came into force on 10 June 1988. On the contrary, the article expressly confers jurisdiction and powers on the two High Courts and the inferior courts. Obviously counsel was focusing only on what the amendment has removed from art 121(1) and ignoring what it retains. F G

[19] The flaw in counsel's argument is in assuming that the two High Courts have been stripped bare of their judicial power by the removal of those words from art 121(1), turning them into emperors without clothes. The contention is as good as saying that with effect from 10 June 1988, the two High Courts, namely the High Court of Malaya and the High Court of Sabah and Sarawak ceased to exist, with the attendant consequence that all decisions and orders that the two High Courts made after that date could potentially be declared null and void. Herein lies the fallacy (and danger) of counsel's argument. It is based on a wrong assumption. H I

[20] The truth is, judicial power has never been removed from the two High Courts at any time either before or after the amendment to art 121(1). The

removal of judicial power from the two High Courts can only be done by removing the whole of art 121(1) from the Constitution, and not merely by removing those few words from the article although, admittedly, they are words of significant import.

[21] It is pertinent to note, if only to be repetitive, that while the 1988 amendment removed those words from art 121(1), importantly it also retains that part of the provision which confers on the two High Courts their jurisdiction and powers as may be conferred by or under federal law. Parliament would not have legislated in that fashion if the intention was to remove judicial power from the two High Courts. The intention clearly was to retain the judicial power of the two High Courts.

[22] For this reason, it is futile for the appellant to argue that those words were taken out by Parliament for the purpose of removing the judicial power of the two High Courts. With or without those words, judicial power is still vested in the two High Courts by virtue of art 121(1) of the Constitution, the extent of which remains the same before and after the removal of those words, which is, 'as provided by federal law' (before the amendment) and 'as conferred by or under federal law' (after the amendment). No more, no less. They may be differently worded but they mean the same thing.

[23] Therefore, to say that the 1988 amendment has removed the judicial power of the two High Courts is a gross distortion of the law and the facts. In fact, by applying to the High Court for the writ of habeas corpus, the appellant recognised that the High Court of Malaya had the jurisdiction and power to grant the relief that he sought for. He cannot now turn around and say otherwise just because the decision was not to his liking.

[24] We were told that the decisions in *Maria Chin* and *Rovin Joty* were wrongly decided, but we were not told what exactly are the principles forming the ratio decidendi of *Semenyih Jaya, Indira Gandhi* and *Alma Nudo* that this court in *Maria Chin* and *Rovin Joty* had 'overlooked' and in what way the alleged oversight has rendered the decisions in the two cases per incuriam. I would want to believe that learned counsel is not suggesting that *Maria Chin* and *Rovin Joty* have no morsel of a value as precedent.

[25] In line with his contention that *Maria Chin* and *Rovin Joty* were decided per incuriam, counsel's argument proceeded on the basis that s 4 of the POCA was enacted in violation of the basic structure doctrine and therefore void as it takes away judicial discretion from the hands of the magistrate when issuing the remand orders for a fixed and non-negotiable period of 21 days under sub-s 4(1)(a) and a further fixed and non-negotiable period of 38 days under sub-s 4(2)(a), totaling 59 days.

[26] It was a regurgitation of the 'basic structure' argument that was presented before three different panels of this court in *Maria Chin, Rovin Joty*, and more recently in *Zaidi bin Kanapiah v ASP Khairul Fairoz bin Rodzuan and other cases* [2021] 3 MLJ 759; [2021] 5 CLJ 581 ('Zaidi bin Kanapiah') which argument was rejected by all three panels, albeit by majority decisions. This is in addition to the earlier decision of this court in *Letitia Bosman v Public Prosecutor and other appeals (No 1)* [2020] 5 MLJ 277; [2020] 8 CLJ 147, which rejected similar line of argument, in that case by a majority of 8:1.

[27] The present appeal is the fifth time in less than two years that the same argument was presented before this court. In *Zaidi bin Kanapiah*, Hasnah Mohammed Hashim FCJ delivering the majority judgment of the court emphatically ruled that the basic structure doctrine has no place in Malaysia. The choice is either to put the ghost of the basic structure doctrine to rest or to persist.

[28] The per incuriam rule that learned counsel relied on to impugn this court's decisions in *Maria Chin* and *Rovin Joty* is a principle developed by the English courts in relaxation of the doctrine of stare decisis or binding judicial precedent. In *Morelle Ltd v Wakeling and another* [1955] 2 QB 379 Sir Raymond Evershed MR of the English Court of Appeal said that as a general rule the only cases in which decisions should be held to have been given per incuriam are:

(a) those decisions given in ignorance or forgetfulness of some inconsistent statutory provision; or

(b) some authority binding on the court concerned so that in such cases some part of the decision or some step in the reasoning on which it is based is found, on that account to be demonstrably wrong.

[29] In the earlier case of *Huddersfield Police Authority v Watson* [1947] 2 All ER 193 Lord Goddard CJ of the King's Bench Division observed:

> Where a case or statute had not been brought to the court's attention and the court gave the decision in ignorance or forgetfulness of the existence of the case or statute, it would be a decision rendered in per incuriam.

[30] Thus, a decision that is rendered per incuriam is a decision that fails to apply a relevant statutory provision or ignores a binding precedent. Going by the definition of 'per incuriam' given in *Morelle Ltd* and *Huddersfield Police Authority*, it is perplexing how it can be said that *Maria Chin* and *Rovin Joty* were decided per incuriam. In the first place, this court in the two cases was not strictly bound by the doctrine of stare decisis such that it must abide by the decisions in *Semenyih Jaya*, *Indira Gandhi* and *Alma Nudo*. Secondly, counsel has not shown which 'inconsistent statutory provision' this court in *Maria*

Chin and *Rovin Joty* had forgotten or was ignorant of.

[31] As for the correctness of the two decisions, it is really a matter of opinion which can be set right by a subsequent bench if the decisions are found to be demonstrably wrong, but not on account of the stare decisis rule. It is settled law that this court has the power to depart from its earlier decision when it is right to do so. That is what this court did in *Public Prosecutor v Ooi Khai Chin & Anor* [1979] 1 MLJ 112; *Public Prosecutor v Ismail bin Yusof* [1979] 2 MLJ 119; *Arulpragasan a/l Sandaraju v Public Prosecutor* [1997] 1 MLJ 1; *Sivarasa Rasiah v Badan Peguam Malaysia & Anor* [2010] 2 MLJ 333; [2010] 3 CLJ 507; and *Tan Yin Hong v Tan Sian Sang & Ors* [2010] MLJU 12; [2010] 2 CLJ 269, to cite just five instances.

[32] In *Sivarasa Rasiah*, the case that opened the floodgates for the application of the basic structure doctrine in Malaysia, this court departed from the decision of the former Federal Court in *Loh Kooi Choon v Government Of Malaysia* [1977] 2 MLJ 187; [1975] 1 LNS 90. In that case the former Federal Court had rejected outright the Indian basic structure doctrine that Mr Loh Kooi Choon attempted to introduce into this country, and the apex court decision stood for some 33 years and was followed by later decisions of this court before it was discarded by *Sivarasa Rasiah* in 2010.

[33] In departing from *Loh Kooi Choon*, Gopal Sri Ram FCJ who delivered the decision of the court relied primarily on the ground that the former Federal Court's reliance on the observations by Lord Mcnaghten in *Vacher & Sons, Limited v London Society of Compositors* [1913] AC 107 at p 118 was misplaced as the remarks there were made in the context of a country whose Parliament is supreme, unlike Malaysia where the Constitution is supreme.

[34] It needs to be pointed out that the basic structure doctrine had no application in *Sivarasa Rasiah* as the case did not involve any amendment to the Constitution, which is an essential feature of the doctrine. There the court was only concerned with the constitutionality of s 46A(1) of the Legal Profession Act 1976, an ordinary law, which prohibited the appellant from being elected to the Bar Council. The question of the constitutionality of any provision of the Constitution did not arise for the court's consideration.

[35] In *Public Prosecutor v Kok Wah Kuan* [2008] 1 MLJ 1; [2007] 6 CLJ 341, this is what Richard Malanjum CJ (Sabah and Sarawak), who was a member of the three-judge bench in *Sivarasa Rasiah*, said on the doctrine of binding judicial precedent:

> The doctrine of binding judicial precedent exists to promote the principle of justice that like cases should be decided alike. It also seeks to ensure certainty, stability and predictability in the judicial process. There can be no denying that the existence of

this doctrine imposes some rigidity in the law and limits judicial choices. But one must not ignore the fact that some flexibility and manoeuvrability still exist.

Though a superior court is generally reluctant to disregard its own precedents, it does have the power 'to refuse to follow' its earlier decisions or to cite them with disapproval. Our Federal Court has, on some occasions, overruled itself. High Court judges occasionally refuse to follow other High Court decisions. An inferior court can manoeuvre around a binding decision through a host of indirect techniques.

[36] Counsel appears to be suggesting that the time is ripe for this court to depart from *Maria Chin* and *Rovin Joty* and to reinstate *Sivarasa Rasiah*, *Semenyih Jaya*, *Indira Gandhi* and *Alma Nudo*. I am not prepared to accept the idea. Counsel's argument that s 4 of the POCA is unconstitutional ignores the fact that the majority in *Zaidi bin Kanapiah* had ruled otherwise. It is an attempt to persuade us to depart from the 3:2 majority decision in that case, which decided that s 4 of the POCA is constitutional.

[37] Lest we forget, there is high authority to say that we cannot do so. In *Kumpulan Perangsang Selangor Bhd v Zaid bin Hj Mohd Noh* [1997] 1 MLJ 789 Gopal Sri Ram JCA (as he then was) delivering the decision of the then Supreme Court had this to say:

Counsel for the appellant, however, invited us to depart from the majority views expressed in *Rama Chandran* and to uphold the minority judgment of Wan Yahya FCJ. We must emphatically reject this invitation for two reasons.

First, although *Rama Chandran* was decided by a majority, it is nevertheless a decision of this court. Contrary to any view that may be held in any quarter, this court is bound by its own decisions, whether arrived at unanimously or by a majority. And the correctness of the decisions of this court may not be called into question save and except before a larger bench of this court specially convened by or upon the direction of the Chief Justice. It is therefore not open for one division of this court to reverse the decision of another division given in the earlier case. If a contrary situation be permitted, then no decision of the apex court will be safe as precedent and uncertainty in law will prevail. For like reasons, the Court of Appeal is bound by its own decisions. See *Hendry v De Cruz* [1949] MLJ Supp 25.

In dealing with an argument such as that presented before us, it is useful to remind ourselves of the basic philosophy of our common law. That philosophy is housed in the expression 'certainty through precedent'. Its main object is to enable members of the public to organize their affairs in accordance with law and for legal advisers to advise their clients with fair accuracy about the state of the law in order to avoid wasteful and unnecessary litigation. A rule by which one division of this court is not to be bound by the decisions of another division will therefore undermine the very foundations upon which our common law rests and cannot therefore be countenanced.

Second, and more importantly, we accept that for the reasons set forth herein, the

majority judgments in *Rama Chandran* are correct and that the minority judgment of Wan Yahya FCJ is wrong. To merely say that because a reasonable tribunal would have found the dismissal to have been unjust and leave the matter there without more is to abdicate the judicial review function entrusted to the superior courts by the Federal Constitution and Parliament.'

[38] The saving grace is that the second reason above, which the learned judge described as more important than the first, implies that the majority view in the earlier case can still be departed from if it is an incorrect decision. In the case before us, the appellant wants the best of both worlds. He wants us to depart from *Zaidi bin Kanapiah* on the constitutionality of s 4 of the POCA where the decision was against him by a majority of 3:2, yet on the academic issue which was decided in his favour by a majority of 4:1, he wants us to desist from doing so. Either way it is his way or no way.

[39] On the issue of larger and smaller benches of the Federal Court, it was the submission of learned counsel for the appellant that the majority in *Maria Chin* and *Rovin Joty* had disobeyed judicial courtesy by departing from *Alma Nudo,* stressing the point that *Alma Nudo* was decided by a bench of nine judges whereas *Maria Chin* and *Rovin Joty* were decided by smaller benches of seven and five judges, and that too by majority of 4:3 and 4:1 respectively. Size does matter to the appellant.

[40] Like the doctrine of basic structure which originates from India, the principle that size does matter is also a principle that originates from the subcontinent, as can be seen from the Indian Supreme Court case of *AR Antulay v RS Nayak and another* 1988 AIR 1531; [1988] 1 MLJ (Crl) 501 where Sabyasachi Mukharji J (later Chief Justice of India) in his majority judgment said:

> 43 The principle that the size of the Bench — whether it is comprised of two or three or more Judges — does not matter, was enunciated in *Young v Bristol Aeroplane Co. Ltd* [1944] 2 All ER 293, 300 and followed by Justice Chinnappa Reddy in *Javed Ahmed Abdul Hamid Pawala v State of Maharashtra* (1985) 2 SCR 8; (1985) 1 SCC 275; 1984 SCC (Crl) 653 where it has been held that a Division Bench of three judges should not overrule a Division Bench of two judges, has not been followed in our Courts. According to well settled law and various decisions of this Court, it is also well settled that a Full Bench or a Constitution Bench decision as in 1952 SCR 284: AIR 1952 SC 75: 1952 Crl LJ 510, was binding on the Constitution Bench because it was a Bench of seven Judges.
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> 44. The principle in England that the size of the Bench does not matter, is clearly brought out in the decision of Evershed, MR. in the case of *Morelle v Wakeling Morelle v Wakeling* [1955] 1 All ER 708, 718-F. The law laid down by this Court is somewhat different. There is a hierarchy within the Court itself here, where larger Benches overrule smaller Benches. See the observations of this Court in *Mattulal v Radhe v Radhe Lal Mattulal v Radhe Lal* (1975) 1 SCR 127; (1974) 2 SCC 365;

AIR 1974 SC 1596, *Union of India v KS Subramaniam Union of India v KS Subramaniam* (1977) 1 SCR 87, 92; (1976) 3 SCC 677, 681; AIR 1976 SC 2433 and *State of UP v Ram Chandra Trivedi* (1977) 1 SCR 462, 475; (1976) 4 SCC 52, 64; AIR 1976 SC 2547. This is the practice followed by this Court and now it is a crystallised rule of law. See in this connection, as mentioned hereinbefore, the observations of the *State of Orissa v Titaghur Paper Mills State of Orissa v Titaghur Paper Mills* (1985) 3 SCR 26; 1985 SCC (Supp) 280.

[41] Incidentally it was my learned sister Justice Zabariah Mohd Yusof who wrote the majority judgment in *Rovin Joty* and myself who wrote the majority judgment in *Maria Chin*. The criticism leveled against the two judgments was pursued with vigour in the present appeal. Learned counsel reminded us not to 'tamper' with the decision in *Zaidi bin Kanapiah* on the academic issue or else we are going to set the law into 'great disorder'. This is what learned counsel said (verbatim from the zoom recording of the proceedings):

What Zaidi bin Kanapiah did was by majority of four judges ... sorry majority of three judges ... 3–2. It's a five-man bench, five justice bench, 3–2, majority of 3–2. So the majority decision stands today. If Your Lordships and my Lady are going to tamper with it, then you are going to set the law into great disorder ... Err ... thats my first point. The second point I make is, that there is the doctrine of ... err ... err ... prospective overruling does not apply and I cannot over emphasise ... I cannot with great respect over emphasise the necessity to adhere to precedent. If I could just share the screen one judgment from the Indian Supreme Court by Justice Dr Bhandari the case of Siddharam and the State of Maharashtra paragraph 138.

[42] Paragraph 138 of the judgment in *Siddharam Satlingappa Mhetre v State of Maharashtra* (2011) 1 SC 694 that learned counsel referred to reads as follows:

138. The analysis of English and Indian law clearly leads to the irresistible conclusion that not only the judgment of the larger strength is binding on a judgment of a smaller strength but the judgment of a coequal strength is also binding on a Bench of Judges of coequal strength. In the instant case, judgments mentioned in paras 124 and 125 are by two or three Judges of this Court. These judgments have clearly ignored the Constitution Bench judgment of this Court in *Sibbia case* which has comprehensively dealt with all the facets of anticipatory bail enumerated under Section 438 CrPC. Consequently, all the judgments mentioned in paras 124 and 125 of this judgment are per incuriam.

[43] On the strength of the above dicta by Dr Dalveer Bhandari J of the Indian Supreme Court, counsel concluded his oral submissions with the following proposition:

So ... (inaudible) where you do not follow the judgment of a larger bench then the decision of the smaller bench is regarded as per incuriam ...

[44] With due respect, to accept the proposition is to desecrate the meaning of 'per incuriam' given in *Morelle Ltd* and *Huddersfield Police Authority*. There is nothing in the two judgments to say that where a smaller bench does not follow the judgment of a larger bench, the decision will be rendered per incuriam. If counsel had wanted us to depart from the generality of the per incuriam rule, he had not proffered any reason why we should do so. Instead, what counsel was trying to impress upon us was that being a smaller bench of three judges, this panel cannot depart from the decision of the larger panel of five judges in *Zaidi bin Kanapiah* as to do so would render our decision on the academic issue per incuriam.

[45] In *Zaidi bin Kanapiah*, the majority (four of the five judges) had decided that the issue of the legality of the appellant's detention was not academic despite the fact that his detention period of 21 days issued under s 4(1)(a) of the POCA had expired by the time his application for the writ of habeas corpus was heard.

[46] In that case, the learned Chief Justice in her minority judgment (majority on the academic issue) spoke of the difference between larger and smaller benches and the doctrine of stare decisis. This was how the learned Chief Justice eruditely expressed her opinion at paras 206–211:

> [206] This court in *Faizal Haris* thus effectively overruled *Ezam*. Given the line of argument and the divergent views on the two lines of authorities, it is pertinent to examine the law on this subject.
>
> [207] The first point is on the difference between larger and smaller benches. In this regard, this is what Peh Swee Chin FCJ observed in *Dalip Bhagwan Singh v Public Prosecutor* [1998] 1 MLJ 1 at p 14; [1997] 4 CLJ 645 at p 662 ('Dhalip'):
>
> > In this connection, the question of a 'full court' or a panel of the Federal Court comprising more than three members as compared with the ordinarily constituted coram of three members of the same court, arises for consideration. In view of the reasons about departing from its previous decisions advanced above, the effect or weight of a decision of a 'full court' and that of an ordinary coram is the same by necessary implication. A full court or a panel larger than the ordinary coram is usually indicated such as when an unusually difficult or controversial question of law is involved, or a question arises as to whether a previous decision of the Federal Court ought to be overruled.
>
> [208] The above passage, to my mind, establishes two principles. Firstly, strictly speaking within the context of our written law, there is no difference in law between a judgment delivered by a smaller bench or a larger bench. This may be inferred from s 77 of the CJA which provides that 'proceedings shall be decided in accordance with the opinion of the majority of the judges comprising the court'. In terms of written law therefore, the number of judges from case to case does not strictly matter. This is because the majority judgment of the court generally becomes law and binding precedent in all subsequent cases. It is therefore not a

ground per se to overrule a subsequent decision of the smaller bench which had departed from the larger bench.

[209] Be that as it may, the second portion of the passage establishes that the number of judges from case to case is nonetheless relevant in terms of the principles of stare decisis — a principle followed assiduously by our courts for nearly a century though it is not expressly contained in our written law. Viewed from this angle, the above dictum of Peh Swee Chin FCJ suggests that the strength and size of a bench in a previous case is one relevant factor when determining whether or not that previous decision ought to be followed in a subsequent case.

[210] Minimally, the non-compliance of a smaller bench of the same court in a subsequent case to a decision of the court delivered by a larger bench in the previous case goes to judicial integrity and courtesy. Dhalip explained the circumstances in which the apex court ought to depart from its previous decisions which is an exercise not governed by the FC or statute. While it is true that there is no legal basis in written law to hold a smaller bench to the decision of a larger bench in a previous decision, it is a matter of stare decisis and judicial policy aimed at preserving public confidence in the Judiciary.

[211] The importance of adherence to the doctrine of stare decisis lies in the fact that it has become the cornerstone of the common law practiced in this country. It is fundamental that decisions of the courts, especially of the apex court, ought to be consistent, in the interests of finality and certainty in the law. Otherwise, the public and lawyers who have regulated their affairs in reliance on a ratio decidendi before it is overruled will face difficulty and confusion in organizing their affairs around such judgments and this in turn will affect public confidence in the Judiciary (see *Dato' Tan Heng Chew v Tan Kim Hor & Another Appeal* [2006] 2 MLJ 293; [2006] 1 CLJ 577; *Public Prosecutor v Datuk Tan Cheng Swee & Anor* [1980] 2 MLJ 276; [1980] 1 LNS 58. See also *Kerajaan Malaysia & Ors v Tay Chai Huat* [2012] 3 MLJ 149; [2012] 3 CLJ 577. If a smaller bench in one case refuses to follow a decision of a larger bench in a previous case deciding the same point of law, the correctness of the decision of that smaller bench ought to be subjected to a higher scrutiny by a subsequent panel of the court — more so in constitutional cases and cases involving fundamental liberties.

[47] I am mindful that a minority judgment does not have any force of law (*Yong Tshu Khin & Anor v Dahan Cipta Sdn Bhd & Anor and other appeals* [2021] 1 MLJ 478) but I am attracted by two propositions of law expounded by the learned Chief Justice in her judgment which I shall embrace as my own. The first is that while it is of great importance to maintain consistency in the decisions of the apex court for the sake of finality in the law and to preserve public confidence in the judiciary, there is no difference in law between a judgment delivered by a smaller bench and a judgment delivered by a larger bench.

[48] The second is that if a smaller bench in one case refuses to follow the decision of a larger bench in a previous case deciding the same point of law, the

correctness of the decision of that smaller bench ought to be subjected to greater scrutiny by a subsequent panel of the court.

[49] What the second proposition postulates is that it is the correctness of the decision that counts and not the size of the bench, large or small. It has never been the law in Malaysia that a smaller bench of the apex court cannot depart from the decision of a larger bench. This appears to be the position in the UK as well. In *Conway v Rimmer* [1968] AC 910 a five member Bench of the House of Lords comprising Lord Reid, Lord Morris of Borth-Y-Guest, Lord Hodson, Lord Pearce and Lord Upjohn overruled the decision of a seven member bench of the same House in *Duncan v Cammell Laird & Co Ltd* [1942] 1 All ER 587 comprising Viscount Simon LC, Lord Thankerton, Lord Russell of Killowen, Lord Macmillan, Lord Wright, Lord Porter and Lord Clauson. Learned counsel for the appellant was therefore off tangent when he said that the decision of a smaller bench that does not follow the decision of a larger bench in a previous case would be a decision that is given per incuriam.

[50] In the case of *Dalip Bhagwan Singh v Public Prosecutor* [1998] 1 MLJ 1; [1997] 4 CLJ 645 ('Dalip Bhagwan Singh') that the learned Chief Justice referred to in *Zaidi bin Kanapiah*, one of the questions of law posed for this court's determination by way of a reference under the old s 66 (since repealed) of the Courts of Judicature Act 1964, and which may be indirectly relevant (if at all) to the issues raised by the appellant in the present appeal, was as follows:

> In an appeal against acquittal at the close of the case of the Prosecution, can an Appellate Judge refuse to apply with or without assigning any reason, the latest decision of the Supreme Court on a point of law and adopt an earlier decision of the Federal Court?

[51] Implicit in the question is the existence of a conflict between an earlier decision of the Federal Court and a later decision of the Supreme Court. The question for the court's determination was, which decision of the apex court should the High Court sitting in its appellate jurisdiction apply, the latest decision of the Supreme Court or the earlier decision of the Federal Court? That is the context in which the decision in *Dalip Bhagwan Singh* is to be understood.

[52] Having considered the authorities, this court answered the question in the negative, that is to say, an appellate judge cannot refuse to apply, with or without assigning any reason, the latest decision of the Supreme Court on a point of law and adopt an earlier decision of its forerunner the Federal Court.

[53] The proposition of law formulated by this court in that case was that when two decisions of the apex court collide on a point of law, the later decision prevails over the earlier. That is the ratio decidendi of the case and it only

applies to courts below the apex court. This court's observations on the issue of larger and smaller benches of the Federal Court must be taken as obiter dicta as it was not essential for the court to decide on the issue in determining the answer to the reference question, which is reproduced again below for ease of reference:

> In an appeal against acquittal at the close of the case of the Prosecution, can an Appellate Judge refuse to apply with or without assigning any reason, the latest decision of the Supreme Court on a point of law and adopt an earlier decision of the Federal Court?

[54] Obiter dictum is a Latin expression which means that which is said *en passant* (in passing), an incidental statement. Observations made by the judge in the course of his judgment, but which are not essential for the decision reached are obiter dicta. Ratio decidendi on the other hand refers to the principle of law formulated by the judge for the purpose of deciding the problem before him. It is essential to distinguish between ratio decidendi and obiter dictum as ratio decidendi is the binding part of the case but not obiter dictum. As I said in *Maria Chin*, care must be taken to separate the wheat from the chaff.

[55] Persuasive as the observations in *Dalip Bhagwan Singh* may be on the issue of smaller and larger benches, it needs to be appreciated that this court in that case was not called upon to decide whether a smaller bench of the Federal Court can depart from the decision of a larger bench. That was not the issue before the court in that case. Rather, the issue before the court was whether the High Court sitting in its appellate jurisdiction could refuse to apply the latest decision of the apex court in preference to its earlier decision. In short, *Dalip Bhagwan Singh* was concerned with the doctrine of stare decisis which, as I mentioned, applies only to courts below the Federal Court. As for the Federal Court itself, it is only constrained by the per incuriam rule.

[56] Be that as it may, given the persuasive value of *Dalip Bhagwan Singh* on the three issues raised by the appellant, namely larger versus smaller benches, judicial precedent and the per incuriam rule, I am taking the liberty and it will not be out of place in my view to reproduce in extenso the following observations by Peh Swee Chin FCJ which provide useful and comprehensive guidance on all three issues:

> The doctrine of stare decisis or the rule of judicial precedent dictates that a court other than the highest court is obliged generally to follow the decisions of the courts at a higher or the same level in the court structure subject to certain exceptions affecting especially the Court of Appeal. The said exceptions are as decided in *Young v Bristol Aeroplane Co Ltd* [1944] KB 718. The part of the decision in *Young v Bristol Aeroplane* in regard to the said exceptions to the rule of judicial precedent ought to be accepted by us as part of the common law applicable by virtue of Civil Law Act

1956, *vide* its s 3.

To recap, the relevant ratio decidendi in *Young v Bristol Aeroplane*'s case is that there are three exceptions to the general rule that the Court of Appeal is bound by its own decisions or by decisions of courts of coordinate jurisdiction such as the Court of Exchequer Chamber. The three exceptions are first, a decision of Court of Appeal given per incuriam need not be followed, secondly, when faced with a conflict of past decisions of Court of Appeal, or a court of coordinate jurisdiction, it may choose which to follow irrespective of whether either of the conflicting decisions is an earlier case or a later one, thirdly, it ought not to follow its own previous decision when it is expressly or by necessary implication overruled by the House of Lords, or it cannot stand with a decision of the House of Lords. There are of course further possible exceptions in addition to the three exceptions in *Young v Bristol Aeroplane* when there may be cases the circumstances of which cry out for such new exceptions so long as they are inconsistent with the three exceptions in *Young v Bristol Aeroplane*.

A few words need to be said about a decision of Court of Appeal made per incuriam as mentioned above. The words 'per incuriam' are to be interpreted narrowly to mean as per Sir Raymond Evershed, MR in *Morelle Ltd v Wakeling and another* [1955] 2 QB 379, 406 as a 'decision given in ignorance or forgetfulness of some inconsistent statutory provision or of some authority binding in the court concerned so that in such cases, some part of the decision or some step in the reasoning on which it is based, is found on that account to be demonstrably wrong'. It should be borne in mind the year of the *Morelle*'s case is 1955 whereas s 3 of the Civil Law Act was enacted in 1956. The ratio in *Morelle*'s case is also part of the common law applicable to us. In this connection, it is interesting to refer to *Cassell & Co v Broome* [1972] AC 1027, 1054. It was held that courts in the lower tiers below the Court of Appeal could not rely on the per incuriam rule applied by the Court of Appeal for itself, but could choose between two conflicting decisions. We may add that they may choose, whatever the dates of the conflicting decisions, as such dates do not matter to the Court of Appeal itself.

The rule of judicial precedent in relation to the House of Lords was stated in *London Tramways v London County Council* [1898] AC 375 that it was bound by its own previous decision in the interests of finality and certainty of the law, but a previous decision could be questioned by the House when it conflicted with another decision of the House or when it was made per incuriam, and that the correction of error was normally dependent on the legislative process.

However, in 1966, Lord Gardiner LC made the following statement on behalf of himself and all the Lords of Appeal in Ordinary commonly known as the 'Practice Statement (Judicial Precedent) 1966' which is set out below:

> LORD GARDINER LC: Their Lordships regard the use of precedent as an indispensable foundation upon which to decide what is the law and its application to individual cases.
>
> It provides at least some degree of certainty upon which individuals can rely in the conduct of their affairs, as well as a basis for orderly development of legal rules.

Their Lordship nevertheless recognize that too rigid an adherence to precedent may lead to injustice in a particular case and also unduly restrict the proper development of the law.

> They propose, therefore, to modify their present practice and, while treating former decisions of this House as normally binding, to depart from a previous decision when it appears right to do so.
>
> In this connection they will bear in mind the danger of disturbing retrospectively the basis on which contracts, settlements of property and fiscal arrangements have been entered into and also the need especially for certainty to the criminal law.
>
> This announcement is not intended to affect the use of precedent elsewhere than this House.

Experience in the United Kingdom has shown that the power 'to depart from a previous decision when it appears right to do so' has been used very sparingly.

In Malaysia, the Federal Court and its forerunner ie Supreme Court, after all appeals to the Privy Council were abolished, has never refused to depart from its own decision when it appeared right to do so, see the above-mentioned Federal Court's cases on the question of burden of proof at the close of prosecution case.

Though the Practice Statement (Judicial Precedent) 1966, of the House of Lords is not binding at all on us, it has indeed and in practice been followed, though such power to depart from its own previous decision has been exercised sparingly also. It is right that we in the Federal Court, should have this power to do so but it is suggested that it should be used very sparingly on the important reason of the consequences of such overruling involved for it can not be lost on the mind of anybody that a lot of people have regulated their affairs in reliance on a ratio decidendi before it is overruled. In certain circumstances, it would be more prudent to call for legislative intervention. On the other hand, the power to do so depart is indicated (subject to a concurrent consideration of the question of the consequences), when a former decision which is sought to be overruled is wrong, uncertain, unjust or outmoded or obsolete in the modern conditions.

In this connection, the question of a 'full court' or a panel of Federal Court comprising more than 3 members as compared with the ordinarily constituted quorum of 3 members of the same court, arises for consideration. In view of the reasons about departing from its previous decisions advanced above, the effect or weight of a decision of a 'full court' and that of an ordinary quorum is the same by necessary implication. A full court or a panel larger than the ordinary quorum is usually indicated such as when an unusually difficult or controversial question of law is involved, or a question arises as to whether a previous decision of the Federal Court ought to be overruled.

If the House of Lords, and by analogy, the Federal Court, departs from its previous decision when it is right to do so in the circumstances set out above, then also by necessary implication, its decision represents the present state of the law. When two decisions of the Federal Court conflict, on a point of law, the later decision therefore, for the same reasons, prevails over the earlier decision.

[57] The reference to the highest court in the first paragraph of the above excerpts is a reference to the Federal Court, which reinforces the view that the apex court is not subject to the doctrine of stare decisis or the rule of binding judicial precedent.

[58] The need for certainty in judicial decisions by the apex court was also discussed in *Asia Pacific Higher Learning Sdn Bhd (registered owner and licensee of the higher learning institution Lincoln University College) v Majlis Perubatan Malaysia & Anor* [2020] 2 MLJ 1; [2020] 1 MLRA 653; [2020] 3 CLJ 153 where Azahar Mohamed CJ (Malaya) in his supporting judgment said:

> [79] ... Any decision of the Federal Court must be treated with utmost deference. More significantly, in my opinion, it is not a good policy for us at the highest court of the land to leave the law in a state of uncertainty by departing from our recent decisions. That will put us in a bad light as the Federal Court will then purports to be in a state of quandary when deciding a case. It is also a bad policy for us to keep the law in such a state of uncertainty particularly upon a question of interpretation of a statutory provision that comes up regularly for consideration before the courts ...
>
> [80] As one would expect, even though judges should not follow previous decisions blindly as stated in *Chiu Wing Wa & Ors v Ong Beng Cheng* [1994] 1 MLJ 89; [1994] 1 CLJ 313 because some facts of the previous case might not apply to the present case despite the same term used, a situation where Federal Court decisions change like a swinging pendulum is nevertheless best avoided to ensure finality and certainty of the law. Definiteness and certainty of the legal position are essential conditions for the growth of the rule of law (see: *The Bengal Immunity Community Limited v The State of Bihar* [1955] 2 SCR 603).
>
> [82] Now, I am not saying that the Federal Court should never depart from an earlier decision. I recognise that while continuity and consistency are conducive to the smooth evolution of the rule of law, hesitancy to set right deviations will retard its growth. Although certainty is important, justice would be the paramount consideration when deciding a case. If judges found that there was error in law resulting to injustice, it is the duty of the Federal Court Judges to correct and ensure justice by departing from the previous decided cases. Bhagwati J, in *Distributors (Baroda) Pvt Ltd v Union of India and Ors* AIR [1985] DC 1585 observed:
>
> > ... It is essential that there should be continuity and consistency in judicial decisions and law should be certain and definite. It is almost as important that the law should be settled permanently as that it should be correctly. But there may be circumstances where public interest demands that the previous decision be reviewed and reconsidered. The doctrine of stare decisis should not deter the Court from overruling an earlier decision, if it is satisfied that such decision manifestly wrong or proceeds upon a mistaken assumption in regard to existence or continuance of a statutory provision or is contrary.
> >
> > To another decision of the Court. 'It was Jackson, J who said in his dissenting opinion in *Massachussetts v United States* (1947) 333 US 611: I see no reason why I should be consciously wrong today because I was unconsciously wrong

yesterday'. Lord Denning also said to the same effect in *Ostime (Inspector of Taxes) v Australian Mutual Provident Society* [1960] AC 459: 'The doctrine of precedent does not compel your Lordships to follow the wrong path until you fall over the edge of the cliff'.

[83] Indeed, the doctrine of stare decisis dictates that as a matter of a general rule of great importance the Federal Court is bound by its own previous decisions. However, there are exceptional circumstances that allow them to depart from the earlier decision, but such power must be used sparingly (see: *Kumpulan Perangsang Selangor Bhd v Zaid bin Hj Mohd Noh* [1997] 1 MLJ 789; [1997] 2 CLJ 11, *Dalip Bhagwan Singh v Public Prosecutor* [1998] 1 MLJ 1; [1997] 4 CLJ 645 and *Merck Sharp Dohme Group & Anor v Hovid Bhd* [2019] 9 CLJ 1). It would be prudent to exercise such power when a former decision, which is sought to be overruled, is wrong, uncertain, unjust, outmoded or absolete in the modern conditions.

[59] The words of wisdom of the learned CJ (Malaya) in para [82] above bears repetition, that although certainty is important, justice would be the paramount consideration when deciding a case. Nothing can be closer to the truth. Indeed, as Lord Denning said in *Ostime (Inspector of Taxes) v Australian Mutual Provident Society* [1960] AC 459:

The doctrine of precedent does not compel your Lordships to follow the wrong path until you fall over the edge of the cliff.

[60] In *Jones v Secretary of State for Social Services; Hudson v Secretary of State for Social Services* [1972] AC 944, 966, this is what Lord Reid said in relation to the question whether the House of Lords should adhere rigidly to precedent:

The old view was that any departure from rigid adherences to precedent would weaken [the certainty of the law]. I did not and do not accept that view. It is notorious that where an existing decision is disapproved but cannot be overruled courts tend to distinguish it on inadequate grounds. I do not think that they act wrongly in doing so: they are only adopting the less bad of the only alternatives open to them. But this is bound to add to uncertainty for no one can say in advance whether in a particular case the court will or will not feel bound to follow the old unsatisfactory decision. On balance it seems to me that overruling such a decision will promote and not impair the certainty of the law.

[61] Lord Reid of course went on to say that this certainty will be impaired unless the practice is used sparingly, adding that he would not however seek to categorise cases in which it should or cases in which it should not. In *Gibson v Government of the United States of America* [2007] 1 WLR 2367; [2007] UKPC 52, Lord Brown of Eaton-Under-Heywood delivering the majority decision of the Judicial Committee of the Privy Council spoke in similar vein when he said:

22 The third issue frankly is the difficult one on this appeal and on this issue, clearly, there is room for two views. There are, indeed, powerful arguments available to both sides. Stare decisis is an important principle. The virtues of certainty and finality

hardly need emphasis or elaboration. As Lord Wilberforce said in *Fitzleet Estates Ltd v Cherry* [1977] 1 WLR 1345, 1349:

> Nothing could be more undesirable ... than to permit litigants, after a decision has been given by this House with all appearance of finality, to return to this House in the hope that a differently constituted committee might be persuaded to take the view which its predecessors rejected. True that the earlier decision was by a majority: I say nothing as to its correctness or as to the validity of the reasoning by which it was supported. That there were two eminently possible views is shown by the support for each by at any rate two members of the House. But doubtful issues have to be resolved and the law knows no better way of resolving them than by the considered majority opinion of the ultimate tribunal.

But the principle is not an absolute one. In the Privy Council it never was. And since the *Practice Statement (Judicial Precedent)* [1966] 1 WLR 1234 the House of Lords too has been free to depart from its own previous decisions. As Lord Bingham of Cornhill recently said in *Horton v Sadler* [2007] 1 AC 307, 323, para 29:

> As made clear in the [*Practice Statement*] former decisions of the House are normally binding. But too rigid adherence to precedent may lead to injustice in a particular case and unduly restrict the development of the law. The House will depart from a previous decision where it appears right to do so.

[62] In the recent case of *Peninsula Securities Ltd v Dunnes Stores (Bangor) Ltd* [2020] UKSC 36, the UK Supreme Court departed from the House of Lords decision in *Esso Petroleum Co Ltd v Harper's Garage (Stourport) Ltd* [1967] 1 All ER 699 because the pre-existing freedom test favoured by the majority in the *Esso* case did not deserve its place in the doctrine of restraint of trade and had been consistently criticised over many years and scarcely defended, and had been rejected in many other common law jurisdictions.

[63] Another example where the House of Lords departed from its earlier decision is *R v Shivpuri* [1986] 2 All ER 334 where it overruled its own decision in *Anderton v Ryan* [1985] 2 All ER 355. In that case Lord Hailsham of St Marylebone LC in the course of his judgment made the following observations, amongst others:

> The first comment I make is that I believe that this is the first time that the 1966 Practice Statement (Note [1966] 3 All ER 77, [1966] 1 WLR 1234) has been applied to a decision as recent as that in *Anderton v Ryan* [1985] 2 All ER 355; [1985] AC 560. Ordinarily I have been loath to take so bold a step, even though I may have entertained privately the thought that such a case so recently and so carefully considered and supported by two such powerfully reasoned judgments was nevertheless seriously open to question. Quite clearly a departure from recent decisions by means of the 1966 Practice Statement has dangers of its own which are too obvious to need elaboration. But there is obviously much to be said for the view about to be addressed by my noble and learned friend that 'If a serious error embodied in a decision of this House has distorted the law, the sooner it is corrected

the better'. This consideration must be of all the greater force when the error, as in the present case, to be corrected by a palinode composed by one of the original authors of the majority judgment.

[64] Coming back to the present case, my learned sister Justice Zabariah Mohd Yusof has pointed out in her judgment that this court in *Mohd Faizal bin Haris v Timbalan Menteri Dalam Negeri Malaysia & Ors* [2006] 1 MLJ 309; [2005] 4 CLJ 613 ('Faizal bin Haris') had departed from *Mohamed Ezam bin Mohd Nor & Ors v Ketua Polis Negara* [2002] 1 MLJ 321; [2001] 4 CLJ 701 ('Mohamed Ezam') by following its earlier decision in *Kerajaan Malaysia & Ors v Nasharuddin Nasir* [2003] MLJU 841; [2004] 1 CLJ 81 ('Nasharuddin Nasir').

[65] In *Nasharuddin Nasir*, the three-member bench comprising Mohamed Dzaiddin Abdullah CJ, Steve Shim CJ (Sabah and Sarawak) and Siti Norma Yaakob FCJ who made up three of the five member bench in *Mohamed Ezam* had in fact resiled from the position that they took in that case, although they did not say so explicitly. This is clear from the judgment of Steve Shim CJ (Sabah and Sarawak) who delivered the unanimous decision of the court. This is what His Lordship said:

> It is trite law that the remedy of habeas corpus is intended to facilitate the release of persons actually detained in unlawful custody. It is the fact of detention which gives the court its jurisdiction (see *Barnado v Ford* [1892] AC 326). The observation by Choor Singh J in *Re Onkar Shrian* [1970] 1 MLJ 28; [1969] 1 LNS 155 is particularly instructive. He said:
>
> > Where the personal freedom of an individual is wrongly interfered with by another, the release of the former from illegal detention may be effected by habeas corpus. The illegal detention of a subject, that is a detention or imprisonment which is capable of legal justification, is the basis of jurisdiction in *habeas corpus*.
>
> The learned judge also quoted with approval the following passage in *Short & Mellor's Practice on the Crown side*, 2nd edn at p 309:
>
> > The primary object of the writ is for the purpose of bringing the body into court, and therefore, if that is impossible, the writ ought not to issue. It should not be used punitively but only remedially. In *R v Barnado* [1892] AC 316, Lord Halsbury said that he could not agree to the proposition that if a court is satisfied that illegal detention has ceased before application for the writ has been made, nevertheless the writ might issue in order to vindicate the authority of the court against a person who has once, though not at the time of the issue of the writ, unlawfully detained another or wrongfully parted with the custody of another. In this the rest of the court agreed.
>
> > In the result, Choor Singh J took the position that a writ of habeas corpus had to be addressed to the person or authority having actual custody of the person allegedly to be detained illegally. That, in my view, represents a correct statement

A of the law. In a situation where the court finds it impossible to issue the writ because the person or authority no longer has custody of the detainee, it should not hear the application. Indeed, it has no jurisdiction to do so.

B **[66]** Whichever way one looks at it, this later position that their Lordships and Ladyship took conflicted with the position that they previously took in *Mohamed Ezam* where the court speaking through Abdul Malek Ahmad FCJ (as he then was) held that since the basis for the detention orders signed by the Minister under s 8 of the Internal Security Act 1960 ('the ISA') was the C outcome of the police investigation carried out on the appellants whilst they were being detained under s 73 of the ISA, the correctness of the decision of the High Court (that the appellants' detention by the police under s 73 of the ISA was lawful) remained a live issue and not academic.

D **[67]** In the result this court in *Mohamed Ezam* dismissed the preliminary objection raised by the respondents that the second appellant's appeal was academic because he had been released from detention. It is inconceivable that the three judges in *Nasharuddin Nasir* had made the decision in ignorance or forgetfulness of their earlier decision in *Mohamed Ezam* as the case was brought E to their attention. Thus the possibility cannot be ruled out that they realised they had made a wrong call in *Mohamed Ezam*. In any event, it is not the appellant's case that the decision in *Nasharuddin Nasir* was made per incuriam, ie wrongly decided.

F **[68]** It is not clear if this change of position by the three judges in *Nasharuddin Nasir* was brought to the court's attention in *Zaidi bin Kanapiah* but it is certainly not reflected in both the majority and minority judgments where all five judges wrote separate judgments. This raises doubts whether the G majority (four of the five judges) in *Zaidi bin Kanapiah* would still have followed *Mohamed Ezam* on the academic issue had they been made aware of the change of position taken by Dzaiddin Abdullah CJ, Steve Shim CJ (Sabah and Sarawak) and Siti Norma Yaakob FCJ in *Nasharuddin Nasir*.

H **[69]** *Nasharuddin Nasir* was endorsed by *Faizal bin Haris* in the following terms by Augustine Paul FCJ who delivered the unanimous decision of the court:

> Be that as it may, that case made it clear that a court has no jurisdiction to hear a writ I filed against the police for irregularities in a detention order under s 73(1) of the Internal Security Act 1960 when it had been superseded by one under s 8(1) thereby bringing into sharp focus the propriety of the judgment of this court in *Mohamed Ezam Mohd Noor v Ketua Polis Negara & Ors* [2002] 4 CLJ 309. The rationale underlying this judgment would, with respect, render the stand taken in the later case unsustainable in law.

[70] For all the reasons aforesaid, I concur with my learned sister Justice Zabariah Mohd Yusof that the present appeal has become academic. Indeed it has, by virtue of the fact that the appellant is no longer being physically detained pursuant to the remand order issued by the magistrate under s 4(1)(a) of the POCA. The High Court was therefore correct in dismissing the appellant's application for the writ of habeas corpus.

[71] I reject counsel's argument that being a smaller bench of three judges, this panel cannot depart from the decision of the larger bench of five judges in *Zaidi bin Kanapiah* on the academic issue. I have reminded myself that such power to depart must be exercised very sparingly by this court given the dangerous consequences of the exercise of such power, but having done so, I feel bound by duty to depart from *Zaidi bin Kanapiah* on the academic issue as there are compelling enough reasons to render the decision unsustainable.

[72] The decisions of this court in *Faizal bin Haris*, *Nasharuddin Nasir* and all other cases decided along the same line are reaffirmed. *Mohamed Ezam* must stand overruled. My learned sister Justice Zabariah Mohd Yusof has had sight of this supporting judgment in draft and has agreed to it.

Zabariah Yusof FCJ (delivering majority judgment of the court):

BACKGROUND

[73] The appeal herein is against the decision of the High Court which had dismissed the application by Goh Leong Yong (the appellant) for the writ of habeas corpus against the detention of the appellant under s 4(1)(a) of Preventive of Crime Act 1959 ('the POCA').

[74] The appellant was arrested by the Malaysian Anti-Corruption Commission ('MACC') on 2 October 2020. He was held under remand from 3 October 2020 until 11 October 2020. He was released on MACC bail on 11 October 2020.

[75] On 27 October 2020, the appellant was arrested by the police in relation to Cheras Report 027048–27049/19 for an alleged offence under s 4(1)(c) of the Common Gaming Houses Act 1953 ('the CGHA'). He was under remand from 27 October 2020 until 29 October 2020.

[76] On 29 October 2020, the appellant was arrested under another report for the same alleged offence under s 4(1)(c) of the CGHA, by the investigating officer (IO), Inspector Faizal bin Anuar.

[77] On 30 October 2020. the appellant was arrested under s 3(1) of the

POCA by the first respondent. On 31 October 2020, the second respondent ordered the appellant to be remanded for 21 days from 31 October 2020 until 20 November 2020 under s 4(1)(a) of the POCA. The remand order dated 31 October 2020 under s 4(1)(a) of the POCA was ordered by the second respondent based on 2019 Cheras report.

AT THE HIGH COURT

[78] The appellant filed for writ of habeas corpus on 3 November 2020. At that point in time, the appellant was detained under s 4(1)(a). The return date as can be seen on the notice of motion in the High Court was on 9 November 2020.

[79] The habeas corpus application was fixed for hearing on 16 November 2020. However, on 13 November 2020, before the expiry of 21 days remand order (20 November 2020), the first and third respondents appeared before the second respondent and obtained an order for the appellant to be remanded for a further 38 days from 13 November 2020 under s 4(2)(a) of the POCA.

[80] When the application for habeas corpus came up for hearing on 16 November 2020, counsel for the respondents took a preliminary objection on the ground that the application for the writ of habeas corpus against the detention under s 4(1)(a) had been rendered academic by reason of 38 days remand order under s 4(2)(a) granted by the magistrate. The High Court in upholding the preliminary objection, dismissed the application on the same day based on the following reasons:

(a) the application for the writ of habeas corpus against the detention under s 4(1)(a) dated 31 October 2020, has been rendered academic by reason of the order by the second respondent under s 4(2)(a) dated 13 November 2020, and hence the detention order under s 4(1)(a) is no longer a live issue;

(b) the order by the second respondent on 13 November 2020 for the appellant to be remanded under s 4(2)(a), effectively ended the earlier order dated 31 October 2020. Based on this sequent of events, the court was of the opinion that the challenge by the appellant against the detention order dated 31 October 2020 under s 4(1)(a) was no longer relevant and had become academic;

(c) based on the authorities of, inter alia, the case of *Ahmad Saidi bin Md Isa v Timbalan Menteri Hal Ehwal & Ors* [2006] 3 MLJ 208; [2006] 1 CLJ 977, the High Court held that the subject matter of the appeal was the validity of the first detention under s 4(1)(a) which had lapsed by the time the second detention order issued against the detenu under s 4(2)(a). As the detention order under s 4(1)(a) has ended, there was no

longer a valid lis before the court for adjudication. Any views which the court may express about the validity or otherwise of the said order under s 4(1)(a) would be wholly academic, given the current order then, was under s 4(2)(a);

(d) reliance on the ratio in the case of *L Rajanderan a/l R Letchumanan v Timbalan Menteri Dalam Negeri, Malaysia & Ors* [2018] Supp MLJ 393 at p 398; [2010] 7 CLJ 653 at at p 398 where the Federal Court said:

> The cases referred to above illustrate the principles upon which the courts will consider in allowing for judicial review on an executive detention. It may be stated this way. A writ of Habeas Corpus must be directed only against the current detention order even if the earlier arrest of the detainee is irregular ...

(e) hence, the application for the writ of habeas corpus was dismissed as the application for the writ of habeas corpus for the detention under s 4(1)(a) has been rendered academic.

AT THE FEDERAL COURT

[81] Dissatisfied with the decision, the appellant lodged this appeal to the Federal Court. Before us, counsel for the appellant advances the following submissions in support of his appeal:

(a) it is not open to a court moved for habeas corpus to entertain preliminary objections by reason of the imperative language of art 5(2) of the Federal Constitution ('the FC'). In any event the application was not academic as a matter of law. The real question in habeas corpus is whether the detention is lawful (*Mohamad Ezam bin Mohd Noor v Ketua Polis Negara & Other Appeals* [2002] 4 MLJ 449) (the academic point);

(b) s 4 of the POCA under which the detention was made is unconstitutional;

(c) the detention was tainted with mala fides;

(d) the exercise of the Minister of his power under s 22 of the POCA by including the Common Gaming Houses Act 1953 ('the CGHA') in item 5 of the First Schedule to POCA is ultra vires the spirit and intendment as expressed in the recitals to POCA read with art 149 of the FC;

(e) the statement of facts delivered under s 4(1)(a) does not bring the appellant's case within the recitals of POCA; and

(f) the magistrate failed to adhere to the guidelines as stated by learned Vernon Ong FCJ in *Zaidi bin Kanapiah v ASP Khairul Fairoz bin Rodzuan and other cases* [2021] 3 MLJ 759; [2021] 5 CLJ 581 and hence there has been procedural non compliance which renders the detention

of the appellant under s 4(1)(a) as unlawful.

DECISION

The academic point

[82] The argument pertaining to the 'academic point' stems from the decision of the High Court which held that, the challenge on the remand order under s 4(1)(a) of the POCA is academic on 16 November 2021, as on that date, the detention of the appellant under the said section has lapsed. Before the expiry of the detention of 21 days under s 4(1)(a) of the POCA, the appellant was detained under s 4(2)(a) of the same for 38 days. Hence the High Court was of the view that the application had been rendered academic by reason of the second detention order and the first detention under the remand order for 21 days is no longer a live issue.

[83] Article 5(2) of the FC provides that where an individual who has been *unlawfully detained*, he may complaint to the High Court or any judge of the High Court and the court must investigate into the complaint.

[84] In this regard s 365 of the Criminal Procedure Code provides that:

> 365 The High Court may whenever it thinks fit direct —
>
> (a) That any person who:
>
> (i) *is detained in any prison* within the limits of Malaysia on a warrant of extradition whether under the Extradition Act 1992 (Act 479); or
>
> (ii) is alleged to be *illegally or improperly detained in public or private custody* within the limits of Malaysia,
>
> be set at liberty;
>
> (b) That any defendant *in custody* under a writ of attachment be brought before the Court to be dealt with according to law.

[85] The form of application is provided for in s 366 which provides as follows:

> 366. Every application to bring up before the Court a person *detained* on a warrant of extradition or alleged to be *illegally or improperly detained in custody* shall be supported by affidavit stating where and by whom the person detained and, so far as they are known, the facts relating to the detention, with the object of satisfying the Court that there is probable ground for supposing that the person is detained against his will and without just cause.

[86] The operative words in the aforesaid provisions are, 'unlawfully detained', 'illegally detained' or 'improperly detained'. Writ of habeas corpus is

only available to a person who is being physically detained unlawfully (*Thomas John Barnardo v Mary Ford* [1892] AC 326). In an application for a writ of habeas corpus, the remedy is for the release of the persons unlawfully detained, and nothing else. When a person is no longer 'detained' (ie he has already been released under that particular detention order), there is no issue of the writ of habeas corpus to be issued, as there is no 'authority' or body' that detained him any longer. His release is therefore no longer an issue. A writ of habeas corpus has to be addressed to the person or authority having actual physical custody of the person alleged to be detained illegally. It is used primarily to secure the release of a person detained unlawfully or without legal justification. The court does not have jurisdiction to determine the matter if a person is no longer detained. Support for this proposition can be found in *Re Onkar Shrian* [1970] 1 MLJ 28 where the court held that:

> Where the personal freedom of an individual is wrongly interfered with by another, the release of the former from illegal detention may be effected by habeas corpus. The illegal detention of a subject, that is a *detention or imprisonment* which is incapable of legal justification, *is the basis of jurisdiction in habeas corpus*.

[87] The ratio in *Re Onkar Shrian*, was adopted in subsequent landmark cases of this vourt in preventive detention, as in *Kerajaan Malaysia & Ors v Nasharuddin Nasir* [2003] MLJU 841; [2004] 1 CLJ 81 where Steve Shim CJSS at p 89 said that:

> It is trite law that the remedy of habeas corpus is intended to facilitate the release of persons actually detained in unlawful custody. It is *the fact of detention which gives the court its jurisdiction*.

[88] Abdul Hamid Mohammad FCJ (as he then was), in *Sejahratul Dursina @ Chomel bte Abdullah v Kerajaan Malaysia & Ors* [2006] 1 MLJ 405; [2008] 1 CLJ 593, agreed with the views as expressed by Steve Shim FCJ in *Nasharuddin Nasir* and referred to s 365 of the CPC and art 5(2) of the FC in which His Lordship said:

> [15] *Under both provisions, only one remedy is provided* ie to set the detainee at liberty or to release him which actually means the same thing. Indeed, that is what habeas corpus is about: to release a person who is being detained 'illegally or improperly', to quote the words of s 365 (a)(ii) of the CPC. *The person must be under detention. Only then can he be released if the detention is found to be illegal or improper.* (Emphasis added.)

[89] The challenge by the appellant in the present appeal is on the detention under s 4(1)(a) of the POCA where the facts show that when the application for habeas corpus was brought before the High Court on 13 November 2020, the appellant was no longer detained under s 4(1)(a) of the same. By then, he was detained under s 4(2)(a) for 38 days. Hence, the subject of detention (or the lis), for adjudication under s 4(1)(a), no longer exists.

[90] The principle established in *Mohd Faizal bin Haris v Timbalan Menteri Dalam Negeri Malaysia & Ors* [2006] 1 MLJ 309; [2005] 4 CLJ 613 and *L Rajanderan a/l R Letchumanan v Timbalan Menteri Dalam Negeri, Malaysia & Ors* [2018] Supp MLJ 393; [2010] 7 CLJ 653, is that a writ of habeas corpus must be directed against the current order of detention. Following that, in the determination of whether a detention is unlawful, the court must consider whether there has been a procedural non-compliance of statutory condition precedent for the current detention. Given that:

(a) the condition precedent under the law pursuant to which the detention is made may vary according to the law under which the detention was made; and

(b) the only remedy for an application for habeas corpus is for the release of the detainee under detention,

it follows that the application for the writ of habeas corpus must be directed to the current detention order. If the detainee is no longer detained under the provision in which the application for habeas corpus was made, then the application is rendered academic, because there is no body to be released. Consequently, such application is rendered academic.

[91] Counsel for the appellant submitted that the ratio on the academic point in *L Rajanderan a/l R Letchumanan v Timbalan Menteri Dalam Negeri, Malaysia & Ors* [2018] Supp MLJ 393; [2010] 7 CLJ 653 and *Mohd Faizal bin Haris v Timbalan Menteri Dalam Negeri Malaysia & Ors* [2006] 1 MLJ 309; [2005] 4 CLJ 613 is no longer applicable, in view of the decision in *Mohamed Ezam bin Mohd Nor & Ors v Ketua Polis Negara* [2002] 1 MLJ 321; [2001] 4 CLJ 701. This was also the view expressed by the majority (on the academic point) in *Zaidi bin Kanapiah*, where four out of the five judges were unanimous on the academic point, in that, the fact that the earlier detention under s 4(1)(a) of the POCA for 21 days has ended, does not render the challenge on such detention as being academic, despite it has been superseded by another detention order under s 4(2)(a) of the POCA. It was held as a live issue despite the 21 days detention has lapsed and the detenu was being detained under s 4(2)(a) for 38 days.

[92] Counsel for the appellant further urged this court to depart from *Mohamad Faizal bin Haris*, *L Rajanderan a/l R Letchumanan*, and to adopt *Mohamed Ezam*, in determining the academic point. In this regard, it is pertinent to see the rationale why *Mohd Faizal bin Haris*, established the general rule that the challenge in an application for a habeas corpus hearing must be directed at the current preventive order.

[93] The dominant issue in *Mohd Faizal bin Haris*, is whether a valid detention order made against a person under s 6(1) of the Dangerous Drugs

(Special Preventive Measures) Act 1985 ('the Act') can be vitiated by irregularities in his arrest and detention under s 3 of the Act. To appreciate the argument, one need to look at the statutory requirements of the Act in determining whether there has been procedural non-compliance of statutory requirement for the detention to be unlawful, which had been explained extensively in *Mohd Faizal bin Haris*, which I can do no better but to reproduce hereinbelow:

> Under s 3(2)(a) there is no authorisation required to detain the person arrested under s 3(1) for the first 24 hours. A detention for the next 24 hours requires the authority of a police officer of or above the rank of an Inspector. After the expiry of the 48 hours, the authority of or above the rank of Assistant Superintendent of Police is required under s 3(2)(b) if the person detained is to be detained any further for a period not exceeding 14 days. Section 3(2)(c) is in two parts. The first part relates to the detention of a person beyond the 14-day period authorised under s 3(2)(b). It cannot exceed 60 days from the date of the initial arrest. The authority for detention for this period requires a report by a police officer of or above the rank of Deputy Superintendent of Police to the Inspector General or to a police officer designated by the Inspector General of the circumstances of the arrest and detention. The second part requires the Inspector General or the police officer so designated to further report the same to the Minister. There is no stipulation that this report must be made within the 14-day period as suggested in *Tan Yap Seng v Ketua Polis Negara & Ors* [1991] 2 CLJ 1400 ... but there must be evidence of the actual date it was made in order to determine whether it was done so 'forthwith' as required by s 3(2)(c). It must be observed that as the detention under s 3(2)(b) shall not be '... more than forty eight hours...' and under s 3(2) for not '... more than fourteen days ...' with the maximum having been prescribed they have in contemplation a period of detention which is specific. The authority for detention must specify the precise period of days, not exceeding the permissible maximum, for which detention has been authorised. This is significant in order to ensure that a person is not detained unnecessarily.
>
> *The facts of the case as enunciated earlier reveal that there has been non-compliance with the requirements of* s 3(2)(a), (b) and (c). There is no evidence on record to show compliance with s 3(2)(a) in that there is nothing to indicate that a police officer of or above the rank of inspector had authorised the detention of the appellant for more than 24 hours. The authority to detain the appellant under s 3(2)(b) and (c) is general. With regard to the detention under s 3(2)(b) it is for a period 'melebihi 48 jam ...' and in respect of s 2(c) it is for a period 'melebihi 14 hari ...'. They do not specify the precise period of days for which the appellant is to be detained under the two provisions. *It follows that there have been procedural irregularities in the detention of the appellant prior to the issue of the detention order under section 6(1) by the Minister. This raises the question of whether the irregularities vitiate the subsequent regular detention order issued by the Minister.*

It was further held in *Mohd Faizal bin Haris*, that:

> [5] It is only when the wording of a statute requires a proper arrest as a *condition precedent* to the making of a subsequent detention order can a person make a valid complaint of the detention.

A At p 381 (MLJ); p 629 (CLJ) of the report:

> ... Thus even if the report of investigation was prepared as a result of an illegal arrest the weight to be attached to it is a matter exclusively within the purview of the Minister. The court will not be concerned with the use of the report of investigation by the Minister. The consideration of a statement made by an illegally detained person cannot therefore be prohibited. The result is that the legality of the detention of a person under s 3(2) is not a condition precedent to the making of a detention order against him under s 6(1).
>
> The corollary is that a detention order can be made against a person under s 6(1) even when his detention under s 3(2) was irregular. The general rule that a writ of habeas corpus must be directed against the current order of detention therefore applies where the detention under s 6(1) has been made subsequent to an arrest and detention under s 3(1) and (2). It follows that where a detention order has been made under s 6(1) the writ of habeas corpus must be directed only against that order even if the earlier arrest and detention is irregular. This view is supported by *Barnado v Ford* [1892] AC 326 where Lord Halsbury said that he could not agree to the proposition that if a court is satisfied that illegal detention has ceased before application for the writ has been made, nevertheless the writ might issue in order to vindicate the authority of the court against a person who has once, though not at the time of the issue of the writ, unlawfully detained another or wrongfully parted with the custody of another.

[94] Given the general rule and principle established by *Mohd Faizal bin Haris*, in determining the legality of any detention order in an application for the writ of habeas corpus, the following must be fulfilled, namely:

(a) that the writ of habeas corpus must be directed against the current order of detention; and

(b) to determine what is the condition precedent under the provision of the law pursuant to which the detention order was issued.

In *Mohd Faizal bin Haris* the 'current' detention order (then) was under s 6 of the Act. Despite the non compliance of procedural requirements under s 3(2)(a), (2)(b) and (2)(c) of the Act, it was held that, as the wording of the statute under s 6(1) of the Act did not require a proper arrest as a condition precedent to the making of a subsequent detention order under s 6(1), the appellant cannot make a valid complaint of the detention under s 6(1). The court held further:

> [6] The *precondition* to the exercise of jurisdiction under s 6(1) is, inter alia, only a consideration of the report of investigation. *There is no stipulation in s 6(1) that it must be the result of a valid detention*. The report of investigation therefore *has no direct link with the detention*. It can still be considered by the Minister even if it contains a statement from a person whose detention under s 3(1) is irregular. This is because just as in the case of the use of illegally obtained evidence subject to the weight to be attached to it.
>
> [7] ... the result is that the *legality of the detention of a person under s 3(2) is not a*

condition precedent to the making of a detention order against him under s 6(1). A detention order can be made against a person under s 6(1) even when his detention under s 3(2) was irregular.

[8] *Generally a writ of habeas corpus must be directed against the current order of detention even when the earlier arrest is irregular. It follows that where a detention order has been made under s 6(1) the writ of habeas corpus must be directed only against that order even if the earlier arrest and detention are irregular. Thus any irregularity in a detention order made under s 3(2) when it had been superseded by one under s 6(1) is not a relevant matter for consideration. A prior illegality which has ceased cannot be the subject of inquiry.*

[9] By reason of the foregoing the prior irregularities in the detention of the appellant under s 3(2) were not relevant to a consideration of the legality of the detention order made under s 6(1). The detention order made against the appellant under s 6(1) was regular. (Emphasis added.)

[95] In *Mohd Faizal bin Haris*, the precondition to the exercise of the Minister's power to order a detention under s 6(1) of the Act was merely to consider the reports of investigation made by the police and the inquiry officer and there was no necessity to explain the sequence of events that had transpired prior to the making of the order.

[96] Still on the academic point, as early as 2010, this court in *L Rajanderan a/l R Letchumanan v Timbalan Menteri Dalam Negeri, Malaysia & Ors* [2018] Supp MLJ 393; [2010] 7 CLJ 653 was urged to depart from *Faizal bin Haris*, to which was refused for the following reasons:

[9] ... A writ of habeas corpus must be directed only against the current detention order even if the earlier arrest of the detainee is irregular. The court is also not concerned with the vagueness, sufficiency or relevancy of the grounds of detention which is the sphere of subjective exercise of the Minister's discretion under the various executive detention legislations unless mala fide on his part is shown (see *Karam Singh v Menteri Hal Ehwal Dalam Negeri* [1969] 2 MLJ 129; [1969] 1 LNS 65 see also *Minister of Home Affairs, Malaysia & Anor v Karpal Singh* [1988] 3 MLJ 29). Any questions on the legality or propriety of the arrest or detention of a detainee at the investigative stage is *not a relevant consideration nor is it a pre-condition to the order of detention of the Minister.*

[10] *Only when statute requires an act to be a condition precedent* to the making of a detention order can a valid complaint made against that detention. Under the Act there are two *conditions precedent* for the Minister to consider before making the detention order. These are found in s 6(1) of the Act which states that:

6 Power to order detention and restriction of powers

(1) Whenever the Minister, after considering:

(a) the complete report of investigation submitted under subsection (3) of section 3 and

(b) the report of the Inquiry Officer submitted under subsection (4) of section 5,

is satisfied with respect to any person that such person has been or is associated with any activity relating to or involving the trafficking in dangerous drugs, the Minister may, if he is satisfied that it is necessary in the interest of public order that such person be detained, by order (hereinafter referred to as a 'detention order') direct that such person be detained for a period not exceeding two years. (Emphasis added.)

[11] The scheme under the Act (similarly under POPOC) is that before a detention order is directed, the police would need to conduct an investigation which includes the power to detain any suspected persons. The manner on conducting the investigations and arrests at this stage, is *neither a condition precedent nor a matter which has a direct link with the detention order* and thus not a ground for judicial review ...

[97] This court in *L Rajanderan a/l R Letchumanan*, held that the academic point is neither new nor novel as it has been considered in *Mohd Faizal bin Haris*, and *Timbalan Menteri Keselamatan Dalam Negeri, Malaysia & Ors v Arasa Kumaran* [2006] 6 MLJ 689; [2006] 4 CLJ 847.

[98] The decisions in *Mohd Faizal bin Haris* and *L Rajanderan a/l R Letchumanan* are in contrast to the decision in the case of *Muhammad Jailani bin Kasim v Timbalan Menteri Keselamatan Dalam Negeri, Malaysia & Ors* [2006] 6 MLJ 403; [2006] 4 CLJ 687 which is a detention under the Dangerous Drugs (Special Preventive Measures) Act 1985. However, one must understand the reason for the decision in *Muhammad Jailani bin Kasim* and it certainly is not a departure from the ratio in *Mohd Faizal bin Haris*. This is 'a challenge on the omission of the inquiry officer to adduce any evidence by way of affidavit to show that an inquiry was conducted by a proper and qualified inquiry officer to prepare a report under s 5 of the Act for the consideration of the Minister. The Federal Court held that it has been recognised in a number of cases 'that a procedural requirement may be mandatory or directory. A mandatory requirement is one that goes to the root of the matter and is of direct relevance to the detention order. The breach of a mandatory requirement will render the detention order invalid without the need to establish prejudice ... the power of the court to intervene is limited to only matters of compliance with procedural requirements ...' since *the report of the inquiry officer is a statutory pre-condition under s 5 to the exercise of the Minister's powers of detention under s 6(1) of the Act,* the failure to produce any evidence to prove that the inquiry officer had complied with that requirement under s 5 or to support 'the role that he played' under that section, is a clear breach of a statutory procedural requirement and thus subject to judicial review. This is unlike the situation in *Mohd Faizal bin Haris* as the concern is s 3. The report of the inquiry officer under s 5 in *Muhammad Jailani bin Kasim* was held by the Federal Court as a necessary and mandatory pre-condition to the exercise of the minister's power

under s 6(1) of the Act since the law requires the Minister to consider that report before issuing a detention order. As such affidavits need to be filed to answer the allegation that the inquiry officer had not conducted any investigations. And since there was no explanation from the inquiry officer to show the role played by him, the regularity of the current detention by the Minister was itself subject to judicial review. The defect thus is not the illegality of the prior detention under s 3 (as in *Mohd Faizal bin Haris*) that affects the current detention order of the Minister itself.

[99] *L Rajanderan a/l R Letchumanan*, also held that previous cases such as *Koh Yoke Koon v Minister for Home Affairs, Malaysia & Anor* [1988] 1 MLJ 45; [1987] 1 LNS 67, which held that a detention made against a suspect who had been illegally detained by the police at the investigation stage is subject to judicial review, was considered as no longer good law since this is not a procedural non-compliance of a condition precedent to nullify the detention order (see also *Lee Kew Sang v Timbalan Menteri Dalam Negeri Malaysia & Ors* [2005] 2 MLJ 631; [2005] 3 CLJ 914).

[100] This court in *L Rajanderan a/l R Letchumanan*, reasoned that the exclusion to produce affidavits of the arresting officer who exercised his power of detention under s 3(2)(a) and (2)(b), is not a defect that may vitiate the detention order under s 6, as that is not a condition precedent under the same.

[101] Given that the only remedy in an application for the writ of habeas corpus is release of the detainee from the detention, if the detainee is no longer under detention, the writ of habeas corpus ought not to issue. From the three separate orders given by the judges in *Mohamed Ezam*, at the end of the appeal, goes to show that habeas corpus is only available to persons who are detained. In that case the second appellant had earlier been released. The order by Mohamed Dzaiddin CJ that 'the appellants be released', which on the face of it appears to refer to all the appellants, including the second appellant who had since been released from police detention. However the order by the learned Chief Justice in using the word 'appellants' in *Mohamed Ezam*, could not have meant as including the second appellant who had since been released. Steve Shim CJSS released the appellants only in relation to the unlawful detention under s 73(1) of the ISA but no order as to the detention by the Minister under s 8 of the ISA, which supports the proposition that an application for habeas corpus ought to be directed to the current detention order. Abdul Malek Ahmad FCJ and Siti Norma Yaakob FCJ, in their respective orders, specifically referred to the first, third, fourth and fifth appellants. Both did not order the release of the second appellant.

[102] Four out of the five judges in *Zaidi bin Kanapiah* held that the issue on the validity of the earlier detention under s 4(1)(a) is not academic, despite it

already lapsed and a fresh detention under s 4(2)(a) was in force, at the material time. The effect of the order granted by Vernon Ong FCJ, Hasnah FCJ and Zaleha Yusof FCJ which ordered the release of the the appellants from the detention under s 4(1)(a) of the POCA is that their Lordships were granting the release of the appellants under the said section when they were no longer detained under the same. Heavy reliance was placed on *Mohamed Ezam* in support of the academic issue in *Zaidi bin Kanapiah*. *Mohamed Ezam* concerned the preliminary issues of whether:

(a) the second appellant's appeal was academic as he had since been released from police detention; and

(b) the remaining applications for habeas corpus ought not to have been directed against the respondent (the Inspector General of Police) but against the Minister of Home Affairs ('the Minister') because the appellants were no longer being detained by the respondent under s 73 of the ISA but at the behest of the Minister under s 8(1) of the ISA.

The panel in *Mohamed Ezam* decided that the appeal was not academic without really going into the basis that the application of habeas corpus should be directed against the relevant detaining authority at that point in time, i.e the Minister. However, it is to be noted that Steve Shim CJSS only released the appellants from the detention under s 73(1) of the ISA when His Lordship made findings that the detention under s 73(1) of the ISA was unlawful, but there were no findings as far as the detention of the appellant by the Minister under s 8 of the ISA is concerned. This is evident from the judgment at p 345 paras c-d, which I reproduced below, which essentially and impliedly meant that the application for habeas corpus ought to be directed against the Minister and not the police in that case:

> For all the reasons stated, I find it appropriate to agree with the learned Chief Justice and my learned brother and sister judges in holding that the detentions of the appellants by the police under s 73(1) of the Act are therefore unlawful. *In that context, I agree that the appeals should be allowed and the appellants released accordingly. However, as the undisputed facts show that the appellants ie first, third, fourth and fifth appellants have now been detained by order of the Minister under s 8 of the Act, the issue of whether or not to grant the writ of habeas corpus for their release from current detention does not concern us. That is a matter of a different exercise.* (Emphasis added.)

[103] This court in *L Rajanderan a/l R Letchumanan* referred to *Mohd Faizal bin Haris*, but did not refer to *Mohamed Ezam* and did not address art 5(2) of the FC. *Mohamed Ezam* referred to, and considered art 5(2) of the FC. Be that as it may, it is to be observed that *Mohd Faizal bin Haris* was decided after *Mohamed Ezam*. It is a later decision than *Mohamed Ezam*. The panel in *Mohd Faizal bin Haris* considered and overruled *Mohamed Ezam* and was of the view that the stand taken by the panel in *Mohamed Ezam*, is unsustainable, as can be

seen from their judgment which is as follows:

> In *Kerajaan Malaysia & Ors v Nasharuddin Nasir* [2003] MLJU 841; [2004] 1 CLJ 81 where it was held that an order of detention made under s 8(1) of the ISA 1960 is not tainted by an illegality or irregularity in the s 73 detention. However the conclusion was reached not on the rationale as discussed in this judgment but on the principles enunciated in *Karam Singh v Menteri Hal Ehwal Dalam Negeri Malaysia* [1969] 2 MLJ 129. Such an approach would leave unanswered the effect of procedural irregularities in an earlier detention which has been superseded by another detention order. Be that as it may, that case made it clear that a court has no jurisdiction to hear a writ filed against the police for irregularities in a detention order under s 73(1) ISA when it had been superseded by one under s 8(1) thereby bringing sharp focus the propriety of the judgment of this court in Mohd Ezam. The rational underlying this judgment would, with respect, render the stand taken in the later case unsustainable. (Emphasis added.)

[104] The panel of three judges (Dzaiddin CJ, Steve Shim CJSS, Siti Norma Yaacob FCJ) in *Kerajaan Malaysia & Ors v Nasharuddin Nasir* [2003] MLJU 841; [2004] 1 CLJ 81 were part of the five panel of judges (Mohd Dzaiddin CJ, Wan Adnan Ismail PCA, Steve Shim CJSS, Abdul Malek Ahmad FCJ, Siti Norma Yaacob FCJ) in *Mohamed Ezam*, who had earlier unanimously agreed with the judgment of Abdul Malek Ahmad FCJ in *Mohamed Ezam* on the academic point. These three panel of judges in *Nasharuddin Nasir* however reversed themselves from their earlier stand in *Mohamed Ezam*, when Steve Shim CJSS delivering the FC judgment at p 90 para a-d in *Nasharuddin Nasir* said that where a person is no longer under detention then the issuance of a writ of habeas corpus is an impossibility. The courts should not hear the application, as the court has no jurisdiction to do so. That is the situation faced by the court in *Nasharuddin Nasir*. There the custody was no longer with the police but had been transferred to the Minister upon the issuance of a detention order under s 8 of the ISA. In contrast with *Mohamed Ezam,* despite the custody was no longer with the police but had been transferred to the Minister upon the issuance of a detention order under s 8 of the ISA, the panel there was of the view that the application is not academic and still was a live issue.

[105] The three panel of judges in *Nasharuddin Nasir*, held that the legality or illegality of the detention under s 73 was irrelevant in determining the legality or illegality of the detention order by the Minister under s 8 (refer to pp 99–100 of the judgment). To that extent *Mohamed Ezam*, has been overruled by *Nasharuddin Nasir*. I am of the view that the position taken by *Nasharuddin Nasir*, on this issue is the preferred stand.

[106] In addition, a scrutiny of the judgment of Steve Shim CJSS in *Mohamed Ezam* discloses that the reasons in the determination of the legality of the detention under s 73(1) of the ISA is no different from what has been posited by *Mohd Faizal bin Haris*, ie for the detention to be unlawful, the court has to

scrutinise the condition precedent for the detention under the relevant provision. In *Mohamed Ezam*, His Lordship disagreed that s 73(1) of the ISA and s 8 of the ISA are inextricably connected, ie they are wholly dependent on each other — that there has to be a police investigation under s 73 before the Minister can properly exercise his discretion to issue a detention order under s 8 or conversely, that no detention order under s 8 can properly be issued by the Minister without the necessary investigation by the police under s 73. His Lordship was of the view that, in the exercise of the Minister's discretion, he need not necessarily have to consider and rely on police investigation under s 73.

His Lordship further held that 'if it was the intention of Parliament to impose a mandatory obligation on the part of the Minister to consider the police investigation under s 73 of the ISA before he could issue a detention order under s 8 of the ISA, Parliament would have expressly provided for it as she did in the Dangerous Drugs (Preventive Measures) Act 1985, wherein s 3(1) states:

> 3(1) Any police officer may, without warrant, arrest and detain, for the purpose of investigation, any person in respect of whom he has reason to believe there are grounds which could justify his detention under subsection (1) of section 6.

And s 6(1) states:

> Whenever the minister, after considering:
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> (a) the complete report of the investigation submitted under subsection (3) of section 3; and
>
> (b) the report of the Inquiry Officer submitted under subsection (4) of section 5,
>
> is satisfied with respect to any person that such person has been or is associated with any activity relating to or involving the trafficking in dangerous drugs, the Minister may, if he is satisfied that it is necessary in the interest of public order that such person be detained, by order (hereinafter referred to as a 'detention order') direct that such person be detained for a period not exceeding two years from the date of such order.

To detain a person under the Dangerous Drugs (Preventive Measures) Act, it is a mandatory obligation on the Minister to consider the police investigations or reports submitted to him. This is evident from s 6(1)(a) of the Act. Such similar express provisions are conspicuously absent in s 8 of the ISA or s 73 of the ISA.

[107] Examined in the context stated, Steve Shim CJSS in *Mohamed Ezam* departed from the view expressed in *Re Tan Sri Raja Khalid bin Raja Harun Inspector-General of Police v Tan Sri Raja Khalid bin Raja Harun* [1988] 1 MLJ 182; [1987] 2 CLJ 470 and *Theresa Lim Chin Chin & Ors v Inspector General of Police* [1988] 1 MLJ 293; [1988] 1 LNS 132. The latter two cases held that ss 73(1) and 8 of the ISA are so inextricably connected that the subjective test should be applied to both provisions which mean that the court cannot require

the police officer to prove to the court the sufficiency of the reason for his belief under s 73(1) and whether or not the allegations in the said report on which the s 8 detention order was based, were sufficient or relevant, was a matter to be decided by the Minister. If he was satisfied on a subjective basis that the appellant's activities had threatened national security, it was not open to the court to examine the sufficiency or relevance of the allegations contained in the report.

In *Mohamed Ezam*, which Steve Shim CJSS was of the view that the objective test is applicable to s 73(1), His Lordship explained the preconditions in s 73(1), which has to be fulfilled, where the police officer must have reason to believe:

(a) that there are grounds which would justify detention of the detainee under s 8; and

(b) that the detainee has acted or is about to act or is likely to act in any manner prejudicial to the security of Malaysia or any part thereof or to the maintenance of essential services therein or to the economic life thereof'.

In the end, His Lordship found that there was sufficient compliance with s 73(1)(a) from the affidavits filed, that at the time of their arrests, the detainees were told that they were arrested and detained for having acted in a manner likely to prejudice the security of the country. But as for the requirements under s 73(1)(b), it has not been met. Here, the burden is on the respondent to satisfy the court by way of material evidence that the detaining authority had reason to believe that the detainees had acted or were about to act or were likely to act in a manner prejudicial to the security of Malaysia. A thorough perusal of the affidavits filed by the respondent find them to contain nothing more than bare denials in response to the allegations contained in the affidavits affirmed by the respective appellants. This is hardly surprising given his reliance on s 16 of the Act and art 151(3) of the Constitution. No particulars have been disclosed in the respondent's affidavits to show that the appellants had acted or were about to act or were likely to act in any manner prejudicial to the security of Malaysia, etc. In the circumstances, the requirements under s 73(1)(b) has not been discharged by the respondent. Furthermore, the matters disclosed in those affidavits do not seem to have any bearing on the press statement issued by the Inspector-General of Police. In effect, the respondent failed to discharge the initial burden of satisfying the court as to the jurisdictional threshold requisite under s 73(1). Hence His Lordship held that the detention of the appellants by the police under s 73(1) of the Act are therefore unlawful.

[108] Thus, from the aforesaid, even in *Mohamed Ezam*, Steve Shim CJSS referred to the condition precedent as found in s 73(1) of the ISA in deciding on the legality of the detention order under the said section.

[109] Counsel for the appellant argued that if the Bench in *Nasharuddin Nasir*, wished to alter the view they had unanimously adopted in *Mohamed Ezam*, it should have referred the matter to a differently constituted Bench for argument. I do not see that argument as having any merit. There is no prohibition for a judge to depart from his previous decision when it appears legally right to do so, although as a matter of policy such exercise ought to be done sparingly. However, too rigid an adherence to precedent may lead to injustice in a particular case and also unduly restrict the development of the laws (Lord Gardiner LC in 'Practice Statement (Judicial Precedent) 1966'). If the judges found that there was error in law resulting to injustice, it is indeed the duty of the Federal Court judge to correct and ensure justice by departing from the previous decided cases (Azahar Mohamed CJM in *Asia Pacific Higher Learning Sdn Bhd (registered owner and licensee of the higher learning institution Lincoln University College) v Majlis Perubatan Malaysia & Anor* [2020] 2 MLJ 1; [2020] 1 MLRA 653; [2020] 3 CLJ 153).

[110] The majority judgment (on the academic point) in *Zaidi bin Kanapiah*, when addressing the academic point held that:

> [214] *Ezam* when read properly and in context posits the ratio decidendi that *the legality of a detention or detentions must be viewed as a single overarching transaction. This is because the legality of the detention must be addressed at the time the application for habeas corpus was made.* The subsequent release (and by extrapolation the extended detention) in light of a finding of lawfulness or unlawfulness of the initial detention renders the entire issue of detention a live matter
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> ...
>
> [229] The judgments in *Lee Kew Sang* and *Theresa Lim* coherently flow with the line of reasoning adopted by this court in *Ezam*. The foregoing authorities establish the proposition that when a person is detained, the legality of his detention is to be adjudicated by reference to the date the application for a writ of *habeas corpus* is filed. The detaining authorities are not permitted to 'shift the goal post' — so to speak — by alleging that further or subsequent detentions have been made with a view to render the argument on the impugned detention academic. In other words, the detaining authority cannot rely on subsequent detentions to circumvent the illegality of the initial remand or detention under challenge at the time of filing of the writ of habeas corpus. Accepting such an argument would amount to condoning an abuse of the process of the court and would unduly narrow the interpretation of art 5(2) — a safeguard of a fundamental liberty — against settled constitutional cannons of interpretation. It would also render the safeguard in art 5(2) illusory. (Emphasis addded.)

[111] I disagree with the proposition that the legality of a detention or detentions must be viewed as a single overarching transaction. It is misconceived to say that the detaining authority relies on subsequent detentions to circumvent the illegality of the initial remand or detention under challenge at the time of filing of the writ of habeas corpus. It is trite principle of

law that, in an application for a writ of habeas corpus, the remedy is the release of the detainee from the detaining authority. If it is proven that the detention of the detenu is unlawful because of procedural non compliance of conditions precedent of the relevant statute, a release of the detenu is, off course, inevitable. There may also be the issue of more than one detention order issued by different detention authorities for different period of time, not to mention the different provisions of the statute in which the detention order was issued in which different consideration of condition precedent applies. Therefore, it is pertinent for the appellant to properly direct his challenge to the current detention order. It is to be observed that *Mohamed Ezam*, *Nasharuddin Nasir* and *Theresa Lim Chin Chin* concerned detention under ss 8 and 73(1). *Theresa Lim Chin Chin* and *Re Tan Sri Raja Khalid bin Raja Harun* held that ss 8 and 73(1) are inextricably connected, which Steve Shim CJSS in *Nasharuddin Nasir* disagreed. In *Nasharuddin Nasir*, His Lordship held that even when the detenu was still in custody at the date of the decision but pursuant to an order of a different authority (ie the Minister), the court has no jurisdiction to hear an application for habeas corpus directed at another authority (ie the police) which can be seen at p 90 para a-d:

> ... a writ of habeas corpus had to be addressed to the person or authority having actual physical custody of the person alleged to be detained illegally. That, in my view, represents a correct statement of the law. In a situation where the court finds it impossible to issue the writ because the person or authority no longer has custody of the detainee, it should not hear the application. Indeed, it has no jurisdiction to do so. This is precisely the position in the instant case. Here, the facts show that when the application came up for full argument before the court, the police no longer had the custody of the respondent. Custody had been transferred to the Minister upon the issuance of a detention order under s 8 of the ISA. In the circumstances, it would have been appropriate for the respondent to file a fresh notice of motion for a writ against the detention order issued by the Minister. In the absence of such a motion, the court had embarked on a misconceived course of action in assuming jurisdiction.

(See also *Sejahratul Dursina*.)

Hence how can both detentions (under ss 73(1) and 8 of the ISA) be considered as a 'single overarching transaction'?

[112] It is to be observed that in *Mohamad Ezam*, the panel therein did not explain why they ruled that the detention of the appellant under s 73(1) ISA was a live issue and not academic despite he was no longer detained under the said section, but by the Minister under s 8 of the ISA. This is evident from the judgment at p 481 (MLJ); p 346 (CLJ):

> ... the prosecution team, raised two preliminary issues. The first was that the second appellant, who had been released four days earlier, was no longer a person being restrained of his personal liberty and the second was that the remaining appellants

were then being detained under the powers of the Minister of Home Affairs (hereinafter 'the Minister') under s 8(1) of the Internal Security Act 1960 ('the ISA').

As for the first preliminary objection, he stressed that since the second appellant had been released, his appeal was no longer a living issue and was purely academic. As for the second preliminary objection, he reiterated that the other four appellants were no longer under police custody as the Minister had ordered them to be detained under s 8(1) of the ISA with effect from 2 June 2001. This undisputed fact makes mockery, he said, of the fact that the applications for habeas corpus are directed not against the Minister but against the Inspector General of Police (hereinafter 'the IGP') as the respondent. Since they were no longer under police custody under s 73 of the ISA, he added, the appeal has been rendered academic. The appropriate course of action, he suggested, was to file a writ of *habeas corpus* against the Minister.

Reference was made to *Menteri Hal Ehwal Dalam Negeri, Malaysia & Ors v. Karpal Singh* [1992] 1 MLJ 147; [1992] 1 CLJ 36; [1992] 1 CLJ Rep 212 and *Re PE Long @ Jimmy & Ors; PE Long & Ors v Menteri Hal Ehwal Dalam Negeri Malaysia & Ors* [1976] 2 MLJ 133 to buttress his arguments.

In reply, Sulaiman Abdullah for the appellants submitted that as regards the first issue, the second appellant is facing a High Court order declaring his detention to be lawful and should he decide to take civil proceedings, the parties would remain the same and it could amount to res judicata.

All previous habeas corpus cases had decided that s 73 and s 8 of the ISA were inextricably linked. The Minister, he argued, made the order under s 8 based on the police investigations while the appellants were being detained under s 73 of the ISA. The validity of the High Court decision was therefore a live issue.

After a short recess, we unanimously held that the issue is still alive in view of the finding of the High Court that the detentions of the five appellants are lawful and decided that there was no merit to the preliminary objections. We accordingly ordered the appeals to proceed on the next hearing date. (Emphasis added)

[113] Further, the majority (on the academic point) in *Zaidi bin Kanapiah*, finds support on the academic point when it referred to the Privy Council decision in *Fuller v Attorney General of Belize* (2011) 79 WIR 173 in stating that habeas corpus application is not academic merely because the detainees were released on bail (para 204).

[114] That particular passage is not to be taken out of context, as it refers to the legality of bail which depends on the legality of the detention. The central issue in the appeal of *Fuller v Attorney General of Belize* relates to the extent of the jurisdiction of the Supreme Court of Belize on an application for habeas corpus in an extradition case. One of the features of the case is the fact that there was inordinate delay which render the application of the extradition an abuse of process, which in essence was the basis of the appellant's application for habeas corpus.

[115] The application of the habeas corpus was against the backdrop of the

English Extradition Act 1870 which was extended to Belize. The Act provides for a scheme of extradition of a person whose presence is required in a foreign country to stand trial in respect of a criminal offence for which he is charged. The detention in *Fuller v Attorney General of Belize*, is not pursuant to a preventive detention under preventive laws. It is detention under punitive laws. Hence the consideration in the application for habeas corpus there, was in a different context and is not applicable to our present appeal where the application for habeas corpus is circumscribed by the provisions of POCA which is enacted under art 149 of the FC. In approaching the present appeal, the court must be guided by the clear words of the FC and the provisions of POCA (*Theresa Lim Chin Chin*).

[116] In any event, firstly, bail is never an issue in preventive detention in our case. Secondly, this court has established that a person on bail is not 'under custody or physically detained' that would attract the application for habeas corpus under preventive detention laws. Abdul Hamid Mohammad FCJ (as he then was), in *Sejahratul Dursina*, after agreeing with the views as expressed by Steve Shim FCJ in *Nasharuddin Nasir* where His Lordship referred to s 365 of the Criminal Procedure Code and art 5(2) of the FC said:

> [15] Under both provisions (s 365 of the CPC and art 5(2) of the FC), only one remedy is provided ie to set the detainee at liberty or to release him which actually means the same thing. Indeed, that is what habeas corpus is about: to release a person who is being detained 'illegally or improperly', to quote the words of s 365 (a)(ii) of the CPC. *The person must be under detention. Only then can he be released if the detention is found to be illegal or improper.* (words in italics included)
>
> [16] A number of cases were referred to us. I think, the case of *Re Onkar Shrian* [1970] 1 MLJ 28, a judgment of the High Court of Singapore is very pertinent on this issue. In that case, the applicant was arrested in Singapore for an offence alleged to have been committed in Kuala Lumpur, Malaysia. He was produced before a magistrate in Singapore on the same day. On the same day, *the applicant was released on cash bail and the proceedings were adjourned to the following day*. On the following day, the applicant appeared in the magistrates court where the deputy public prosecutor applied for an order to return the applicant to Malaysia. The application was opposed by the applicant. The court adjourned to another date to enable the applicant to apply for habeas corpus. The applicant applied for an order that the writ of habeas corpus be issued against the respondent (the magistrate) to produce the applicant and thereafter to be released. It must be noted that during the material time, ie, when the application was made and heard, *the applicant was on bail and 'not in actual custody*.
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> [17] Choor Singh J dismissed *the application on the ground that a person at large on bail is not detained in custody so as to be entitled to the writ of Habeas corpus* which is issued only when the applicant is in illegal confinement. (Emphasis added.)

[117] In like vein, Abdoolcader SCJ in *Cheow Siong Chin v Menteri Dalam Negeri, Malaysia & Ors* [1985] 2 MLJ 95; [1985] CLJ Rep 59 held that a

person under restrictive preventive order is not 'physically detained, imprisoned or in custody' and hence it is not of a nature to attract the application of the writ of habeas corpus. It was held that 'partial custody' is not the nature of custody envisaged in an application for habeas corpus. It was suggested by the learned judge that the appellant may seek other remedies.

[118] It was also argued by counsel for the appellant, that the material date to be considered for the purpose of deciding the legality of an order of detention in a habeas corpus application is the return date, which, in this case is 9 November 2020. The majority (on the academic point) in *Zaidi bin Kanapiah* held at para [229] that 'The judgments in *Kanyu Sayal* and *Theresa Lim Chin Chin*, 'flow with the line of reasoning adopted by this court in *Ezam*' to establish the proposition that when a person is detained, the legality of his detention is to be adjudicated by reference to the date the application for a writ of *habeas corpus* is filed.

[119] The case of *Kanyu Sayal v District Magistrate, Darjeeling* 1974 AIR 510 referred to in *Zaidi bin Kanapiah* cited various Indian authorities which are at odds with each other as to which date is the correct date to be taken to determine the legality of the detention of the detainee is to be adjudicated. This issue as to when the legality of the detention in a habeas corpus application is to be adjudicated, has been determined by this court in *Sejahratul Dursina* when it held that:

> (2) Although the appellant argued that the material date to be considered for the purpose of deciding the legality of an order of detention in a habeas corpus application was not the date of the decision but the date of the hearing, there should not, or could not, be a separation of the date of hearing from the date of the decision. The date fixed for decision fact forms part of the hearing; the hearing of an application certainly includes the decision thereof.

[120] The stand taken by *Sejahratul Dursina* is the preferred view as the court is addressing the application of the writ of habeas corpus on the day of the decision. The facts of the present appeal show that, on *the day of the decision, the appellant is no longer under detention under* s 4(1)(a), hence the application for habeas corpus for the detention under s 4(1)(a) is no longer relevant and academic. The learned High Court judge did not err in this respect.

[121] It is to be observed that the issue in *Theresa Lim Chin Chin* is not on the legality of detention to be adjudicated by reference to the date the application for a writ of habeas corpus is filed. The focus in *Theresa Lim Chin Chin* was on the issue of the constitutionality of s 73 of the Internal Security Act 1960 ('the ISA') as it does not comply with art 151 of the FC, ie the provision for informing a detainee of the grounds of his detention and allegations of facts constituting the grounds. It was contended by the appellant therein, that s 73

is void and as such the arrest and detention of the appellants are illegal. It was argued by the appellants that the arrest by the police under s 73 is subject to judicial scrutiny especially on the grounds to justify the detention of the appellant. There it was also argued that, there are two stages of detention, namely under ss 73 and 8 of the ISA. The appellant contended that the prohibition of disclosure of evidence or information by the authorities premised under s 16 of the Act was only limited to the detention under s 8 and not s 73. Hence impliedly there is nothing in the provision which prohibits the disclosure of evidence or information for the arrest under s 73. However, the court was not persuaded by such argument and held that the 'arrest and detention by the police and detention pursuant to a Ministerial Order or further detention after the matter has been considered by the Advisory Board *as one continuous process beginning with the initial arrest and detention under s 73 … it is within one scheme of the preventive detention legislation*'. Consequently it was held that s 16 of the Act encompass detention under ss 73 and 8 as they are within one scheme of preventive detention legislation. It was in that context that *Theresa Lim Chin Chin* was decided that the arrest under s 73 and the detention under s 8 is to be considered as one scheme. This was not in the context of the academic point as in the present appeal and neither was it in the context of the proposition of the legality of detention is to be adjudicated by reference to the date the application for a writ of habeas corpus was filed. The findings in *Theresa Lim Chin Chin* went on the premise that ss 8 and 73 of the ISA are inextricably linked and consequently s 16 of the ISA and art 151(3) of the Constitution applied which would have the effect of denying the courts the power to review the detention as they could not enquire into the evidence which led to the detention.

[122] Based on the aforesaid, *Mohd Faizal bin Haris*, *L Rajanderan a/l R Letchumanan* are still good law. Steve Shim CJSS's decision in *Mohamed Ezam* which held that the detention under s 73(1) was unlawful premised on non compliance of s 73(1)(b) was actually in line with the ratio in *Mohd Faizal bin Haris*, ie that a detention under any provision of the law must fulfill the condition precedent for it to be lawful. The three panel of judges which presided in *Mohamed Ezam* also presided in *Nasharuddin Nasir* and their decisions, although following the principles in *Karam Singh* (*which held that a court has no jurisdiction to hear a writ filed against the police for irregularities in a detention order under s 73(1) of the ISA when it had been superseded by one under s 8(1)*), contradicted their decision in *Mohamed Ezam*, but in line with that of *Mohd Faizal bin Haris*.

[123] Given the aforesaid, on the academic point, the preliminary objection on the application for the writ of habeas corpus against the detention of the appellant under s 4(1)(a) of the POCA by the senior federal counsel has merits. The issuance of the writ of habeas corpus would not serve any purpose for the

detention under s 4(1)(a) as it has already ended when it was brought before the High Court. Such a challenge has been rendered academic. An application for a writ of habeas corpus must be directed towards the current detention order. The principle as enunciated by *Mohd Faizal bin Haris* and *L Rajanderan a/l R Letchumanan* is still relevant and remain as good law. The learned trial Judge did not err when His Lordship upheld the preliminary objections of the respondent on the academic point.

Whether s 4 of the POCA was complied with in the detention of the appellant

[124] To determine whether the earlier detention under s 4(1)(a) was lawful, the said section is referred to, in order to determine what are the statutory requirements that needs to be fulfilled before the remand order for 21 days can be granted.

[125] It is the relevant statutory provisions of POCA that lay down the procedural requirement that must be referred to, by the courts in determining whether the detention under s 4(1)(a) of the POCA is unlawful. It is not for the courts to create procedural requirement because it is not the function of the courts to make law/rules. If there is no procedural non compliance, the detention cannot be unlawful.

[126] In *Lee Kew Sang*, the appellant was detained under the order by the Deputy Minister of Home Affairs. The detention order was pursuant to s 4(1) of the Emergency (Public Order and Prevention of Crime) Ordinance 1969 (the Ordinance). The appellant applied for the issuance of the writ of Habeas Corpus. He contended that the order was invalid on the following grounds:

(a) the Deputy Minister failed to consider whether criminal prosecution ought to be taken against him; and

(b) the ground of detention was stale and remote in point of law to support the detention under the Ordinance.

The application was dismissed at first instance. The appellant appealed to the Federal Court. At the Federal Court, the panel expressed concerns that similar cases involving challenges to detention under the Ordinance or any preventive detention laws were often decided without reference to relevant statutory provisions with the result that the statutory provisions were not given effect. In *Lee Kew Sang*, it was with regards to the amendments which was done to the Ordinance where more often than not the amendments were not given effect to.

[127] The Federal Court held that both grounds forwarded by the appellant were clearly not within the ambit of the term 'procedural non compliance'. There does not appear to be any provision in the law or the rules, and neither

was the court shown such a provision that requires the Minister to consider whether criminal prosecution ought to be taken against the appellant or that the order must be made within a certain period from the date of the alleged criminal acts. There has been no procedural requirement, that there can never be non-compliance thereof.

[128] The Federal Court held that the grounds are not such that could be relied on, in an application for habeas corpus by virtue of ss 7C(1) and 7D(c) of the Ordinance. On this ground alone, the court in *Lee Kew Sang*, held that the application should have been dismissed by the learned trial judge.

[129] Coming back to the appeal that is before us, to determine whether the detention of the detenu under s 4(1)(a) of the POCA was valid, the first point of reference is the provision of s 4(1)(a) of the POCA itself.

[130] There are three requirements which is provided by s 4(1)(a) of the POCA, namely:

(a) production of a statement in writing;

(b) the statement in writing is signed by a police officer not below the rank of an Inspector;

(c) the said statement in writing must state that there are grounds for believing that the name of that person should be entered on the Register.

[131] In this regard, ASP Khairol Fairoz bin Rodzuan, the firts respondent affirmed an affidavit which is in encl 15, in which he affirmed that he had produced a statement in writing by a police officer by the rank of an ASP which states that there are grounds for believing that the name of the appellant should be entered on the register, before the magistrate on 30 November 2020. The relevant exh 'KFR5' which is 'the statement in writing signed by a police officer not below the rank of Inspector' is attached to the affidavit.

[132] The statement in exh 'KFR5' which was produced before the magistrate is in line with the requirement of the provision under s 4(1)(a) of the POCA.

[133] On the issue of the application of s 28A of the CPC to be read with s 4 of the POCA, this has also been met. If one is to peruse the averment by ASP Khairul Faizol, in para 7 of the affidavit in relation to the same, states that he had duly informed the detenu of the grounds of his arrest as required.

[134] Premised on s 4(1)(a) of the Act, it does not require a detailed grounds to be provided in the statement in writing and neither does it involved the production of any evidence. Suffice it states the police has 'reasons to believe

there are grounds ...'. In the Federal Court case of *Kam Teck Soon v Timbalan Menteri Dalam Negeri Malaysia & Ors and other appeals* [2003] 1 MLJ 321 at p 332, where it concerns the arrest of the appellants pursuant to s 3(1) of the Emergency (Public Order and Prevention of Crime) Ordinance 1969, it was held that:

> Furthermore, s 3(1) only requires arresting officer to have 'reason to believe that there are grounds ...'. It does not require the grounds to be informed to the arrested person. And even if it is required because art 5(3) of the Constitution, ... what the arresting officer had informed the appellant was sufficient compliance with art 5(3) ...
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> Obviously the appellant must have known in substance the reason for his arrest ie that he was arrested because there were grounds which would justify his detention under s 4(1) of the Ordinance.

[135] Hence the statement in writing by ASP Khairul Faizol in exh 'KFR5' is regular and suffice to fulfil the requirement of s 4(1)(a) as the statement in writing states to his reasons to believe that there are grounds for believing that the name of that appellant should be entered on the Register. When the statement of the police officer dated 30 October 2020 as stated in the affidavit was produced before the magistrate at the time when the application for remand for 21 days under s 4(1)(a) of the POCA was conducted, the pre conditions and procedural requirement stipulated by the said provision has been met.

[136] Therefore the remand order for 21 days issued by the magistrate on 31 October 2020, for the appellant to be remanded from 31 October 2020 until 20 November 2020 under s 4(1)(a) of the POCA is valid and lawful.

[137] Counsel for the appellant in his written submissions contends that the appellant is also challenging the detention under s 4(2)(a) on the basis that it is groundless, procedural non compliance and mala fide. However the challenge of detention under s 4(2)(a) was not addressed in the High Court. The basis of the challenge then was against the detention under s 4(1)(a) when at that point in time the appellant was detained under s 4(2)(a). In fact the argument on the academic point at the High Court and in oral arguments before us pivoted on the challenge of detention under s 4(1)(a) only. Similarly the grounds of the learned High Court judge reflected only the challenge on the detention under s 4(1)(a).

[138] In any event, on the detention under s 4(2)(a), ASP Khairul Fairoz bin Rodzuan has affirmed three affidavits in reply in encl 15 of the appeal records with particular reference to pp 53–64, 116–119 and 121–127 which stated and show that the procedural requirements of s 4(2)(a)(i) and (ii) has been complied with, when he appeared before the magistrate before the expiry of the

21 day remand period under s 4(1)(a). He had produced before the magistrate:

(a) a statement in writing signed by the DPP Yusaini Ameer stating that in his opinion sufficient evidence exists to justify the holding of an enquiry under s 9; and

(b) a statement in writing signed by ASP Khairul Fairoz stating that it is intended to hold an enquiry in the case of the appellant under s 9.

On that basis, the magistrate had granted a further remand of 38 days against the appellant. Therefore as far as the statutory procedure is concerned for the remand to be given for 38 days, it has been complied with.

[139] Given the aforesaid, assuming that the challenge on the detention under s 4(1)(a) is not academic (which I am of the view that it is), there is no procedural non compliance by the respondents in the detention of the appellant under s 4(1)(a). Similarly there is no procedural non compliance by the respondents for the detention under s 4(2)(a). The detention of the appellant under both sections are therefore lawful.

[140] Premised on the above, as far as the academic point is concerned, the respondent's argument has merits. The learned High Court judge did not err when he dismissed the application for the writ of habeas corpus grounded on the academic point as the challenge was against the detention under s 4(1)(a) which had expired.

Whether s 4 of the POCA under which the detention was made is unconstitutional

[141] This issue was addressed extensively by the panel in the case of *Zaidi bin Kanapiah*. Although I am in agreement with the conclusion of the majority that s 4 of the POCA is not unconstitutional, however I am at variance with the reasoning of the majority in arriving to such a finding.

[142] The appellant challenge the constitutionality of s 4 of the POCA premised on the fact that the said section dictates to the magistrate that a remand order for 21 days shall be given upon the production of the appellant before the magistrate. It was submitted by counsel for the appellant that s 4 requires the magistrate which is the judicial arm under art 121 of the FC to act upon the imperative dictate of the Executive. The said section deprives the magistrate of any discretion in exercising its powers when setting out the matters in the section. In the words of counsel for the appellant 'Once confronted with the statement, the magistrate is bound hand and foot to act as a mere rubber stamp and make the order. The only predicate is the production; in the first instance by the police and in the second by the public prosecutor of a statement in writing when determining the application for remand under s 4(1)(a)'.

[143] The minority judgment in *Zaidi bin Kanapiah* was of the view that s 4(1)(a) is unconstitutional, as Parliament has encroached on powers of the Judiciary by dictating to the magistrate a fixed period of 21 days to be granted in the remand order. The majority however maintained that under s 4(1)(a), the magistrate still has a discretion in deciding whether to grant or not the remand under 21 days. The majority argued that the magistrate is not deprived of his/her discretion provided certain procedures are complied with.

[144] Learned counsel for the appellant also contended that s 4 is contrary to the provision of art 121 which provides that judicial power shall be vested with the courts. The learned counsel for the appellant urged the courts to read art 121 as it was, before the amendment in 1988, namely with the words 'shall be vested' still present in the said article.

[145] The majority in *Zaidi bin Kanapiah* has addressed this specific issue when it said:

> [99] To interpret a law based on a provision that no longer reflects the position of the law no longer in existence by virtue of an amendment, is misconceived and defies not only the canons of construction and interpretation but legal logic as well. To do so will create a fallacious precedent that will inevitably lead to unprecedented consequences. The absence of the words 'judicial powers' under art 121 FC does not in any manner or form emasculate the powers of the courts. Au contraire, the jurisdiction and powers of the Judiciary remain intact with the Judiciary. Until and unless cl (1) art 121 FC is amended, the jurisdiction and powers of the courts are as conferred by Federal law. Thus, it necessarily follows the jurisdiction and powers of the courts under POCA do not violate the amended art 121 FC.

[146] I entirely agree with the decision of the majority that one must read the law as it stands at the time, not based on a provision that no longer reflects the position of the law and no longer in existence by virtue of an amendment. One can only read the provision as amended. In this regard, s 35 of the Interpretation Acts 1948 and 1967 (Act 388) applies, which provides, inter alia, that a reference to a particular written law is a reference to that law as amended or extended from time to time. Unless and until it is further amended or challenged under art 128 of the FC or struck down, it remains valid as it is.

[147] We must be reminded that courts are creatures of statutes, and their powers and jurisdiction are derived from federal law (art 121 of the FC) which is enforced at that point in time. POCA is a federal law and hence that is where the magistrate derives his/her power in adjudicating under POCA.

[148] Learned counsel for the appellant submitted that, as s 4 deprives the magistrate of a discretion to decide on the period of days for the remand, shows that Parliament has transgressed on the judicial power, hence the said section is unconstitutional.

[149] Such a contention is without merit. In this regard I refer to the decision of this court in *Letitia Bosman v Public Prosecutor and other appeals (No 1)* [2020] 5 MLJ 277; [2020] 8 CLJ 147 where Azahar Mohamed, CJM delivering the majority decision, where the challenge was in relation to the mandatory death penalty as contained in s 39(2) of the Dangerous Drugs Act 1952. There, it was also argued that the impugned provision deprived the courts of the discretion to impose any other sentence. Azahar Mohamad CJM held that:

> Evidently, Parliament derives its legislative power form the FC. The power to legislate is a plenary power vested in parliament. The issue of legislative competency is to be decided by reference to matters falling within Parliament's power to legislate. What is important in the setting of the present appeals is that the constitutional scheme of the FC empowers Parliament, the legislative branch of the Government to make laws with respect to any of the matters enumerated in Clause (1) Article 74 of the FC and the federal List as set out in the Ninth Schedule. The constitutional provisions highlight the fundamental principle relating to the power of Parliament to make law in respect of a particular matter pursuant to the FC. In this regard, Item 4 of the federal List provides for 'civil and criminal law', including in paragraph (h) 'creation of offences in respect of any of the matters included in the Federal List or dealt with by federal law'.
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> ...
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> [52] In the present appeals, Parliament is empowered by the FC to make laws in respect of the creation of offences, which in my opinion is a broad head or field of legislation over which Parliament can operate. The word 'offence' is not defined in the FC and no definition appears in the Interpretation and General Clauses Ordinance 1948. The word 'offence' in the PC denotes a thing made punishable by the Code or any other law (section 40). The word is also defined in the CPC as any act or omission made punishable by law (section 2). The word 'offence is a general word of wide amplitude. Applying the principles applicable to the interpretation of the legislative lists that I have discussed above, the widest possible construction must be put upon the word 'offence'. In my opinion, parliament's legislative power to create 'offence' includes the power to legislate on ancillary matters that can be fairly and reasonably be included in the entry 'Offence'. Creation of offences serves no purpose in the administration of justice without punishment for its commission. So construed, there could be no doubt, to my mind, that the word 'offence' includes 'punishment'. 'Punishment' has a rational connection to the subject of 'Offence'. In my opinion to prescribe measure of punishment is an integral part to legislate offence. Therefore, there can be no doubt that it is well within the realm of the legislative's power to enact the impugned provisions. I have already discussed the decision of the High Court of Australia in Palling at [43]–[45]. As can be seen the

important point that Barwick CJ is making is this: 'it is beyond question that the Parliament can prescribe such penalty as it thinks fit for the offences, which it creates'.

[57] It can be seen from the foregoing analysis that the power to prescribe punishments is an integral part of the power to enact the offences for which the prescribed punishments are to apply. Thus the power conferred upon Parliament to create offences also enables it to prescribe the punishment to be inflicted on those persons who have been found guilty of that conduct. In the exercise of its legislative power, parliament may fully prescribe a fixed punishment to be imposed by the courts upon the offender found guilty. On the other hand, the judiciary having determined the criminal liability of an accused based on the law, has a duty to pass sentence according to law enacted by the Legislature.

[67] *By prescribing a mandatory death penalty on the cases covered in these appeals, Parliament did not encroach into the power of the Court as it is within their power to do so. This connotes a respect to the doctrine of separation of power and complements the independence and impartiality of the Court. As such, the court as a guardian of constitution is expected to give effect to law duly passed by Parliament.*

[150] Article 74(1) of the FC gives Parliament power to make laws with respect to any of the matters enumerated in the Federal List or the Concurrent List. Amongst the matters in the Federal List are, inter alia, item 4 as reproduced which states:

4. Civil and criminal law and procedure and the administration of justice, including —

(a) Constitution and organization of all courts other than Syariah Courts;

(b) *Jurisdiction and powers of all such courts*;

...

Clearly from the aforesaid provisions of the FC, the jurisdiction and powers of the courts (except the Syariah Courts) are within the Legislative List, List I — Federal List in the Ninth Schedule, meaning Parliament can legislate with regards to jurisdiction and powers of the courts. In addition, art 149 confers power to Parliament to enact POCA.

[151] Thus the FC has conferred upon Parliament the power to legislate on jurisdiction and powers of the courts. In fact art 121 of the FC stipulates where the powers of the courts are derived from. As far as POCA is concerned, art 149 of the FC vests Parliament with the power to legislate and prescribe the period of 21 days in the remand order to be granted by a magistrate under s 4(1)(a) of the same.

[152] In *Letitia Bosman*, the essence of the contention by the appellants therein was that the power to determine the appropriate punishment on convicted criminals is part of the judicial power and only the judiciary can

exercise such function. Therefore, it was argued that it is not for Parliament to encroach on judicial power by stipulating in the law the punishment of death sentence on convicted criminals thus depriving the courts of judicial discretion.

[153] Similarly, in the present appeal, the contention by the appellant is that, by removing the discretion of the courts in determining the remand period under s 4(1)(a) of the POCA is violative of art 121 of the FC and the doctrine of separation of powers.

[154] Azahar Mohamad CJM in *Letitia Bosman* referred to the decision of this court in *Public Prosecutor v Lau Kee Hoo* [1983] 1 MLJ 157 where the court considered the constitutionality of the mandatory death sentence provided by statute, whether it violated art 121. This involved s 57(1) of the ISA 1960 which prescribed a mandatory death sentence for offence having ammunition under one's possession and control in a security area without lawful authority. This court upheld this law as being consistent with art 5(1) and rejected the contention that the provision tantamount to the Legislature usurping the powers of the judiciary. In this regard the cautionary words of Lord Diplock in *Ong Ah Chuan v Public Prosecutor* [1981] AC 648 which was a Privy Council decision, was referred to at p 72 of *Lau Kee Hoo* as to the effect of accepting the argument of the appellant:

> If it were valid, the argument of the appellant (that the mandatory death sentence) under the impugned section of the law which imposed a mandatory fixed or minimum penalty even when it was not capital — an extreme position which counsel was anxious to disclaim.

[155] Barwick CJ in *Ong Ah Chuan* emphasised that such a discretion to impose the measure of punishment is indeed a legislative decision. 'If Parliament chooses to deny the court such a discretion, and to impose such a duty, ... the court must obey the statute in this respect assuming its validity in other respects. It is not, ... a breach of the Constitution not to confide any discretion to the court as to the penalty imposed'.

[156] Thus, it is misconceived to state that Parliament has encroached on the powers of the judiciary, when it enacted laws that provides mandatory sentences or a fixed period of remand to be imposed on detainees. The FC, which is the supreme law of the Federation provides in the Legislative List, List 1 — Federal List in the Ninth Schedule, the powers conferred to Parliament to legislate on matters such as jurisdiction and powers of courts. It is completely within the jurisdiction of Parliament to do so. In our present context art 149 of the FC provides power to Parliament to legislate on POCA.

[157] Article 121 specifically provides that the courts derives its powers from

federal law. The relevant exercise of judicial powers consists of the application of the law by the court according to the terms of the law. As POCA is a federal law, it is for the courts to construe its provision in accordance to what it says. In other words it is for the magistrate to follow what s 4(1)(a) states, ie the granting of the 21 days remand period upon the condition precedent being fulfilled under the said provision.

[158] Counsel for the appellant also submitted that the amendment to art 121 by way of Act A704 is a nullity because it reduces the judicial arm from a separate and independent organ of government to a subordinate or subjugate to Parliament, and it ought to be struck down. This, according to counsel for the appellant, cuts across the doctrine of separation of power as which is part of the basic structure of the FC. This appears to be a collateral attack on Act A704 which cannot be countenanced, when there is no specific challenge to the amendment to art 121.

[159] Counsel for the appellant referred to *Semenyih Jaya Sdn Bhd v Pentadbir Tanah Daerah Hulu Langat and another case* [2017] 3 MLJ 561; [2017] 4 MLRA 554; [2017] 5 CLJ 526; *Indira Gandhi a/p Mutho v Pengarah Jabatan Agama Islam Perak & Ors and other appeals* [2018] 1 MLJ 545; [2018] 2 MLRA 1; [2018] 3 CLJ 145; *JRI Resources Sdn Bhd v Kuwait Finance House (M) Bhd (President of Association of Islamic Banking Institutions Malaysia & Anor, interveners)* [2019] 3 MLJ 561; [2019] 3 MLRA 87; *Alma Nudo Atenza v Public Prosecutor and another appeal* [2019] 4 MLJ 1; [2019] 5 CLJ 780; [2019] 3 MLRA 1. It was submitted that courts can prevent Parliament from destroying the 'basic structure' of the FC (for this, counsel referred to *Sivarasa Rasiah*). While the FC does not specifically explicate what the doctrine of basic structure signifies, it is open to scrutiny, not only for clear cut violation of the doctrines or principles that constitute the constitutional foundation.

[160] On the basic structure doctrine, the majority judgments in *Maria Chin Abdullah v Ketua Pengarah Imigresen & Anor* [2021] 1 MLJ 750; [2021] 2 CLJ 579, *Rovin Joty a/l Kodeeswaran v Lembaga Pencegahan Jenayah & Ors and other appeals* [2021] 2 MLJ 822; [2021] 4 CLJ 1; [2021] 3 MLRA 260 and *Zaidi bin Kanapiah* has addressed this doctrine extensively by referring to the judgment of the learned Raja Azlan Shah FJ in *Loh Kooi Choon v Government Of Malaysia* [1977] 2 MLJ 187; [1975] 1 LNS 90 and Suffian LP in *Phang Chin Hock v Public Prosecutor* [1980] 1 MLJ 70, which had consistently rejected the doctrine. It is already settled that basic structure doctrine has no place in our jurisprudence. Therefore, I will not dwell on it in this judgment.

[161] However, it was argued by the appellant that, in Malaysia, there is no necessity to resort to the theory of an implied limitation upon the power of Parliament to amend a provision of the FC to give effect to the basic structure doctrine. This is because, that doctrine is integrated into the FC by way of art 4(1) which employs the phrase 'inconsistent with *this Constitution*'. Article 4(1) does not say 'inconsistent with *any provision* of this Constitution'.

[162] It is also submitted by the appellant that a harmonious result is obtained by interpreting arts 4(1) and 159 through the application of either the direct consequence test or by applying the pith and substance canon of construction. Accordingly, where federal law amends a provision of the Constitution and a challenge is taken that the amendment violates the basic structure, the court must make that determination by asking whether the direct and inevitable consequence of the amending law is to impact upon the basic structure.

[163] In my view, this does not answer as to how one determines which provision of the FC constitutes basic structure and not amenable to amendment. Article 159 of the FC expressly provides for the procedure on amendment upon the fulfilment of certain requirements. How does one read art 159 harmoniously with art 4 (which, according to counsel for the appellant that it had been impliedly integrated the basic structure doctrine) to determine whether an impugned provision is unconstitutional? Raja Azlan Shah FCJ in *Loh Kooi Choon* clearly has said that the constitutionality of any provision is premised on the provision of the FC, not premised on any concepts or doctrine which are outside the FC. In any event I do not see the relevance of the basic structure doctrine to be applicable to our present appeal because such a doctrine is only relevant when the constitutionality of a law passed by Parliament seeking to amend the FC is challenged. In that situation, applying the doctrine, the court may rule that the provision which sought to be amended forms part of the basic structure of the FC which cannot be amended. Here, s 4 of the POCA does not seek to amend the FC, rendering the basic structure doctrine irrelevant and inapplicable.

[164] Moreover, the cases of *Semenyih Jaya Sdn Bhd v Pentadbir Tanah Daerah Hulu Langat and another case* [2017] 3 MLJ 561; [2017] 4 MLRA 554; [2017] 5 CLJ 526, *Indira Gandhi a/p Mutho v Pengarah Jabatan Agama Islam Perak & Ors and other appeals* [2018] 1 MLJ 545; [2018] 2 MLRA 1; [2018] 3 CLJ 145, *JRI Resources Sdn Bhd v Kuwait Finance House (M) Bhd (President of Association of Islamic Banking Institutions Malaysia & Anor, interveners)* [2019] 3 MLJ 561; [2019] 3 MLRA 87; *Alma Nudo Atenza v Public Prosecutor and another appeal* [2019] 4 MLJ 1; [2019] 5 CLJ 780; [2019] 3 MLRA 1 referred to, by the learned counsel for the appellant are incomparable to the case at present because the relevant legislations which was in issue in the aforesaid cases

A has got nothing to do with preventive laws enacted under art 149, as in our present case.

[165] As far as the role of the courts is concerned, its duty is to interpret the law according to what the statute provides. The powers of the courts are derived B from federal law as prescribed under art 121. If that is not so, then where do the courts derive its powers? It certainly is not from the basic structure doctrine. As such the court's role is to interpret laws enacted by Parliament.

C **[166]** It was submitted by the appellant that Suffian LP in *Phang Chin Hock* sought to follow Raja Azlan Shah FJ in *Loh Kooi Choon* in rejecting the basic structure doctrine without regard to the opposite view of Wan Suleiman FCJ on the point of art 159 and art 4(1) of the FC, that the word 'law' in art 4(1) includes constitutional amendment Acts under art 159. Suffian LP reasoned D out that if it is correct that amendments made to the FC are valid only if it is consistent with the existing provisions in the FC, then obviously no change can be made to the FC, which renders art 159 superfluous. I agree with the statement by Suffian LP in *Phang Chin Hock* on the meaning of the word 'law' in art 4(1). The panel in *Phang Chin Hock*, which consisted of Suffian LP, Wan E Suleiman and Syed Othman FJJ expressed a unanimous decision. There was no contrary views expressed by Wan Suleiman FJ when he said:

> I fail to note any ambiguity when art 4 and 159 are read together.

His Lordship did not say that he disagreed with Raja Azlan Shah FJ on this F issue, in fact His Lordship said:

> The power to amend would not, be restricted by anything set out in the Preamble for there is no Preamble to our Constitution. IT seems to me to be clear that if there is to be any restriction to the right to amend any of the fundamental rights set out in part II, such restriction would have been set out in one of the various clauses of G art 159 itself.

[167] With regards to the law on preventive detention, our Federal Court in *Loh Kooi Choon* held that:

H > The question whether the impugned act is harsh and unjust is a question of policy to be debated and decided by parliament and therefore not meet for judicial determination. To sustain it would cut very deeply into the very being of Parliament. Our courts ought not to enter this political thicket, even in such a worthwhile cause as the fundamental rights guaranteed by the Constitution, for as was said by Lord Mc Naghten in *Vacher & Sons, Limited v London Society of* I *Compositors* [1913] AC 107, 118:
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> > Some people may think the policy of the act is unwise and even dangerous to the community. Some may think it add variance at principles which have long been held sacred. Bu a judicial tribunal has nothing to do with the policy of any act which may be called upon to interpret. That may be a matter for private

judgment. The duty of the court, and its only duty, is to expound the language of the act in accordance with the settled rules of construction. It is, I apprehend, as unwise as it is unprofitable to caveil at the policy of an act of Parliament, or to pass a covert cencore on the Legislature.

[168] It must be reminded that the laws in relation to preventive detention is different from ordinary criminal laws. Premised on this basis, the approach in the application and the interpretation of such laws is distinct from the ordinary detention under the normal criminal law. Parliament has expressed its intent when legislating POCA from the Preamble that it was enacted under art 149 of the FC.

[169] Given the aforesaid, it is my view that s 4 of the POCA is constitutional. The FC has empowered Parliament to legislate on the jurisdiction and powers of the court under art 74 and to legislate POCA under art 149, in this case prescribing the 21 days remand under s 4(1)(a). Powers of the courts is derived from federal law (art 121) and POCA is one of them. By prescribing the 21 days remand period under s 4(1)(a), Parliament does not encroach into the power of the court as it is within Parliament's power to do so. Parliament's power is conferred by the FC, which is the supreme law of the Federation.

Whether the exercise of the Minister of his power under s 22 including the Common Gaming Houses Act 1953 ('the CGHA') in item 5 of the First Schedule to POCA is ultra vires the spirit and intendment as expressed in the recitals to POCA read with art 149; and

Whether the statement of facts delivered under s 4(1)(a) does not bring the detenu's case within the recitals of POCA

[170] Essentially it is the appellant's contention that the Minister abused the power to enact subsidiary legislation conferred upon him by s 22 of the POCA by including the Common Gaming House Act 1973 ('the CGHA') as item 5 of the First Schedule to POCA by employing the phrase 'unlawful gaming'.

[171] Counsel for the appellant also submitted that exh KFR5 in encl 15 of the appeal records which sets out the statement of facts which was relied on, to warrant the detention in 'KFR5' do not come within the description of a crime of 'organised violence' to warrant the exercise of the detaining power.

[172] Section 22 gives the Minister (as agent of the third respondent) power to amend the schedules to POCA. This is a delegated legislative power. But it is not unfettered as the law treats unfettered power or discretion as a contradiction in terms because there are legal limits to every power. Raja Azlan Shah FJ in the seminal decision of the Federal Court in *Pengarah Tanah dan*

Galian, Wilayah Persekutuan v Sri Lempah Enterprise Sdn Bhd [1979] 1 MLJ 135, Raja Azlan Shah Ag CJ expressed in a passage which has remained inviolable, that:

> Unfettered discretion is a contradiction in terms. *Every legal power must have legal limits, otherwise there is dictatorship. In particular, it is a stringent requirement that a discretion should be exercised for a proper purpose, and that it should not be exercised unreasonably*. In other words, every discretion cannot be free from legal restraint, where it is wrongly exercised, it becomes the duty of the court to intervene. The courts are the only defence of the liberty of the subject against departmental aggression' ... (Emphasis added.)

[173] So that there is no violation of the doctrine of excessive delegation, Parliament has in the recital to POCA provided the governing policy, so as to curb violation of the doctrine of excessive delegation. The exercise of the delegated power is therefore constrained by the purpose for which POCA was enacted. It is the appellant's submission that the inclusion of the CGHA as item 5 runs counter to the purpose for which POCA was enacted. This is therefore a case of use of a power for an improper purpose.

[174] It was also argued as to the Schedule to POCA, that the inclusion of 'unlawful gaming' in para 5 of Part I of the First Schedule of POCA falls beyond the ambit of 'organised violence' against persons or property. It was contended that by incorporating 'unlawful gaming' the Minister had abused his power under s 22 of the POCA as unlawful gaming is not a crime which can be classified as being one that falls within the category of an organised violence. Further, it was argued that gambling is not of a pervading character disturbing the general peace, tranquillity and order of society and therefore does not affect public order, thus a fortiori it cannot come within the phrase 'organised violence against persons or property' which governs the spirit and intendment of POCA. The Minister had wrongly classified it as coming within the recital as prescribed by the FC and by doing so had acted ultra vires POCA.

Section 22 POCA provides:

> The Minister may, by order published in the *Gazette*, amend the Schedules.

Part 1 of the First Schedule of the POCA lists the Registrable Categories as follows:

> (1) All members of unlawful societies which —
>
> (i) use Triad ritual; or
>
> (ii) are constituted or used for purposes involving the commission of offences that are seizable under the law for the time being in force relating to criminal procedure; or
>
> (iii) maintain secrecy as to their objects.

(2) Persons who belong to or consort with any group, body, gang or association of two or more persons who associate for purposes which include the commission of offences under the Penal Code.

(3) All traffickers in dangerous drugs, including persons who live wholly or in part on the proceeds of drug trafficking.

(4) All traffickers in persons, including persons who live wholly or in part on the proceeds of trafficking in persons.

(5) *All persons concerned in the organisation and promotion of unlawful gaming.*

(6) All smugglers of migrants, including persons who live wholly or in part on the proceeds of smuggling of migrants.

(7) Persons who recruit, or agree to recruit, another person to be a member of an unlawful society or a gang or to participate in the commission of an offence.

(8) Persons who engage in the commission or support of terrorist acts under the Penal Code. (Emphasis added.)

[175] Historically, para 5 of Part I of the First Schedule has been in existence as early as 1959 since the promulgation of POCA. This was when Act A1459 which amended POCA into preventive law was laid down, debated and passed by Parliament. This was even before art 121 of the FC was amended. Originally it reads as follows:

5. All persons *habitually* concerned in *the organisation and promotion of unlawful gaming.* (Emphasis added.)

[176] The word 'habitually' was deleted in 2014 vide the Prevention of Crime (Amendment of First and Second Schedule) Order 2014 (PU(A) 122/2014) everything else remains the same. With the deletion, now stands the present para 5.

[177] Given the aforesaid, it was the intention of Parliament since 1959, to include unlawful gaming as one of the categories under POCA. Parliament in its wisdom saw the necessity more than sixty years ago to include the organisation and promotion of unlawful gaming activities due to an upsurge of undesirable criminal activity, causing the public to live in fear. More so with the advent of a real or virtual technology information in the cyberworld, the organisation and promotion of unlawful gaming have become sophisticated and tricky to detect. 'Secret societies, triads and gangsters of yesteryears have morphed into criminal syndicates and cartels involved in forgery, theft, embezzlement and fraud. It is inconceivable to deny Parliament to address this criminal activities through legislation' (as per Hasnah FCJ in *Zaidi bin Kanapiah*.

[178] The meaning of 'organised violence against persons or property' is not to be viewed in a narrow sense as suggested by learned counsel of the appellant

but through the context of the entire scheme of POCA. There is a nexus between unlawful gambling and criminal organisations. Organised crime groups or syndicates often run illegal gambling operations and the money derived from these illegal gambling operations are being used to fund other criminal activities, as in human trafficking, prostitutions, drugs and weapons, not to mention tax evasion and money laundering. It also propagates the rise of unlicensed loan sharks. These gambling operators and loan sharks uses threats and violence against its gambling and drug customers to force compliance. Unlawful gaming activity and its domino effects on society and public order should never be underestimated. As time progresses, unlawful gaming activity has evolved into a much more sophisticated illicit activity that even in this present day constitutes a threat to family institutions, social life, public order and safety. The involvement of organised crime in the business of gambling has, on occasion, led to the corruption of law enforcement officers and other government officers in today's society. Unlawful gaming activity has significant influences on society and is also critical on public health issue.

[179] The aforesaid meets the intent of the Legislature, as its long title expressed, when it enact POCA, namely for effectual prevention of crime throughout Malaysia and for the control of criminals, members of secret societies, terrorists and other undesirable persons, and for matters incidental thereto.

[180] The CGHA, on the other hand is legislated to suppress and control common gaming houses, public gaming and public lotteries. Unlike POCA, CGHA regulates lawful gaming by the issuance of a license by the Minister of Finance under s 27, which authorises a company registered under the Companies Act 1965 to promote and organise gaming.

[181] It was never the intention of the Legislature to include the CGHA under POCA and neither was it included in the Schedule to the same as suggested by the appellants. Thus, the argument of learned counsel for the Appellant that the inclusion of unlawful gaming in the Schedule to POCA is unconstitutional has no merits for the reasons I have stated above.

[182] Premised on the statement in writing signed by ASP Khairol Fairoz bin Rodzuan in encl 15, pursuant to s 4(1)(a) show the activities of the appellant falls under the scope of the item as stated under the First Schedule, Part 1, para 5 of POCA which states:

> 5. All persons concerned in the organization and promotion of unlawful gambling.

The activities also fall under the scope of the items listed under art 149(1)(f) of the FC, namely:

(f) which is prejudicial to public order in, or the security of, the Federation or any part thereof,

The definition of 'public order' has been discussed at length in *Re Application of Tan Boon Liat @ Allen; Tan Boon Liat v Menteri Hal Ehwal Dalam Negeri, Malaysia & Ors* [1976] 2 MLJ 83; [1976] 1 LNS 126, at pp 5–6.

[183] The activities of the appellant in unlawful gambling is indeed a threat to public order which leads to social problems and criminal activities. Therefore the statement of facts as produced by ASP Khairol Fairoz bin Rodzuan before the magistrate for the detention under s 4(1)(a) is within the scope of the First Schedule, Part 1, para 5 of POCA.

The recital of POCA did not set out in full cl (1) of art 149 of the FC

[184] The Recital of POCA reads:

Whereas action has been taken and further action is threatened by a substantial body of persons both inside and outside Malaysia to cause, or to cause a substantial number of citizens to fear, organized violence against persons or property;

And Whereas Parliament considers it necessary to stop such action;

[185] It is the argument of learned counsel that the failure of Parliament to incorporate in the Recital to the Act the complete cl (1) of art 149 of the FC prescribing the intent and purpose would necessarily mean that the POCA is invalid and therefore unconstitutional.

[186] I am not persuaded by such an argument that would result in POCA as being invalid and unconstitutional purely on the technical ground that its recital failed to set out in full cl (1) of art 149 of the FC. So long as the Act in question is passed pursuant to art 149 and the recital to the Act refers to a permissible item listed therein, the requirement of art 149 is met. The same was also addressed by the majority judgment in *Zaidi bin Kanapiah* when it said that:

... With respect, we are unable to agree with learned counsel for the appellants.

[325] The long title of an Act recites the intent and purpose of the Act. The preamble of POCA recited the purpose of the Act which is prevent any incursion or threat by a substantial body of persons within and outside Malaysia causing a substantial number of citizens to fear organised violence against persons or property. There is therefore no fundamental flaw in the Preamble as suggested by the Appellants to the extent that POCA be declared unconstitutional.

[187] Therefore this argument by the counsel for the appellant has no merits.

Whether the detention was tainted with mala fides

[188] The appellant contends that the detention was tainted with mala fide because the police officers making the arrest and recommending the detention were also subject of an inquiry by MACC into their corrupt activities. The appellants are material witnesses in that inquiry.

[189] There is no issue of mala fide in the arrest of the appellant under POCA. The arrest and detention of the appellant under the MACC is separate and distinct from the arrest and detention under POCA. The MACC has its own regulatory statutes in conducting investigations which is within their jurisdiction like the MACC Act 2009 and the AMLATFA 2001. The appellant has failed to show mala fide as it was only his allegation that the police have detained to shut him up from revealing information to the MACC.

[190] Bearing in mind the principles in determining whether the detention of the detenu is lawful and the grounds relied on, is mala fide, this court in *Lee Kew Sang* held that:

> [1] The cases decided prior to the amendments, ie, 24 August 1989, showed various grounds upon which the detention orders were challenged. Mala fide appeared to be the most important ground. Courts seemed to place lesser importance on procedural non-compliance unless the requirement was mandatory in nature. However, the amendments appear to have reversed the position by limiting the ground to only one ground — non-compliance with procedural requirements.

[191] The only ground accepted to challenge the impropriety of the detention is procedural non compliance of the procedures as set out in the Act pursuant to which the detainee was detained.

[192] In *Abdul Razak bin Baharudin & Ors v Ketua Polis Negara & Ors and another appeal* [2006] 1 MLJ 320; [2005] 4 CLJ 445, this court held that:

> So the test, whether subjective or objective, used to determine whether mala fide has or has not been shown is of no relevance now, in a challenge against an act done under s 8. When mala fide itself is no longer an issue under section 8, the test is clearly no longer relevant. The issue now under s 8 is whether a procedural requirement has or has not been complied ...

Further in *Manoharan Malayalam & yang lain lwn Menteri Keselamatan Dalam Negeri Malaysia dan satu lagi* [2008] MLJU 1097; [2009] 4 CLJ 679 this court reiterate the stand by the court that mala fide does not amount to statutory non compliance.

[193] Given the clear authorities as aforesaid, such contention by the detenu that their arrest is mala fide does not amount to a procedural non compliance. It has not been shown that there is no procedural non compliance in the detention of the appellant.

The guidelines in Zaidi bin Kanapiah by Vernon Ong FCJ

[194] Parties submitted before us on the viability of the guidelines which was posited by Vernon Ong FCJ in *Zaidi bin Kanapiah* which can be found at paras 144–147 and submitted that the respondent failed to fulfil the guidelines when granting the remand period of 21 days.

[195] Counsel for the appellant submitted that these guidelines as stated by Vernon Ong FCJ was merely reiterating what is already in the law. However the SFC submitted that, the issue of guidelines for the magistrates which relates to 'Matters to be considered in an application for remand under sub-s 4(1) of the POCA' is clearly per incuriam as, firstly, it was never an issue and neither did parties address it at the hearing of the appeal of *Zaidi bin Kanapiah*. Secondly, SFC submitted that the guidelines states procedures which are over and above than what is required to be done by the magistrate in issuing the 21 days' remand under s 4(1)(a).

[196] My view is this: taking the queue from the cases which I had referred to, in the earlier paragraphs of this judgment, especially *Lee Kee Sang* in an application for a writ of habeas corpus, the determination of whether a particular preventive detention is lawful or not, depends on what is the statutory requirement as required under the particular Act under which the appellant was detained and that whether there has been statutory non compliance. In this case it is s 4(1)(a) of POCA.

[197] Section 4(1)(a) provides the requirements for the remand of 21 days to be granted, which is:

(a) the production of a statement in writing signed by a police officer not below the rank of Inspector stating that there are grounds for believing that the name of that person should be entered on the Register, remand the person in police custody for a period of 21 days; or

(b) if no such statement is produced, and there are no other grounds on which the person is lawfully detained, direct his release.

Those are the two requirements required for the 21 days-remand to be granted. Nothing more and nothing less, because that is what the law says. That is the approach that is to be taken when dealing with an application for the writ of habeas corpus under preventive detention. The validity of the prior arrest before that, is of no consequence because that is not the requirement for the

21-days remand to be given. Issues like 'the police diary discloses sufficient facts and particulars to support the arresting officer's belief that 'grounds exist which would justify the holding of an inquiry into the case of the person arrested' are not procedural requirement under the said section.

[198] It is also to be borne in mind that the procedure of granting remand under the Criminal Procedure Code is not applicable when dealing with remand under POCA. POCA is a special law that deals with remand with a view for detention under preventive law. The Criminal Procedure Code deals with remand under punitive laws which deals with remand for purposes of investigations with a view of charging the detainee. Hence the remand procedure under the Criminal Procedural Code is not applicable for remand under POCA. The cardinal rule of interpretation of *generalibus specialia derogant* applies where a special provision is made in a special statute, that special provision excludes the operation of a general law (refer to the Federal Court decision in *Public Prosecutor v Chew Siew Luan* [1982] 2 MLJ 119; [1982] CLJ 354; *Public Prosecutor v Chu Beow Hin* [1982] 1 MLJ 135 at p 137; [1982] CLJ Rep 288 at p 291).

[199] In any event, with the greatest of respect to my learned brother, Vernon Ong FCJ, the procedures as set out in *Zaidi bin Kanapiah* are merely guidelines and it cannot override and replace the statutory requirements as mandated by s 4 of the POCA because those are procedures provided by law. Hence, in determining the detention under s 4(1)(a), the procedure to be adopted is the one as provided for under s 4(1)(a).

[200] The guidelines goes against the very principle as stated in *Lee Kee Sang* when determining whether a particular detention has complied with statutory requirement as mandated by the relevant section in the Act, in determining whether the detention is lawful or not. Therefore the guidelines are per incuriam.

CONCLUSION

[201] With regards to the challenge on the detention under s 4(1)(a), based on the authorities as discussed in the earlier paragraphs, the challenge of the detention of the appellant under s 4(1)(a) is academic as the detention has come to an end and the appellant is no longer detained under the said section. In addition, there is no procedura non-compliance of any statutory requirements in the detention of the appellant under the provision of s 4(1)(a) of the POCA.

[202] Section 4 of the POCA is not unconstitutional. It does not breach art 121 of the FC. Parliament is empowered by the FC to legislate laws

prescribing for jurisdiction of the courts under art 74, generally and art 149 specifically for POCA. By prescribing a period of 21 days for remand under s 4(1)(a) of the POCA, Parliament did not encroach into the power of the court as it is within their power to do so, which power was conferred by the FC, the supreme law of the Federation. Hence it cannot be said to breach the doctrine of separation of power, in fact it complements the independence and impartiality of the court.

[203] Given the aforesaid, the appeal by the appellant is dismissed.

[204] My learned brother, Abdul Rahman Sebli FCJ has read this judgment and has expressed his agreement, to form the majority judgment of this court.

Appeal dismissed.

Reported by Ashok Kumar